90-262

Supreme Court, U.S.
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No. ___

In The

Supreme Court of the United States

October Term, 1990

SHEILA SIMS,

Petitioner,

v.

JOHN MULCAHY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER NOMINAL DAMAGES SHOULD BE AWARDED AS A MATTER OF LAW WHEN THE JURY IN A BIFURCATED TRIAL HAS FOUND THAT THERE HAS BEEN A CONSTITUTIONAL DEPRIVATION UNDER 42 U.S.C. SECTION 1983?

The Seventh Circuit says No.
The Eighth Circuit says Yes.

II. WHETHER RULE 49a REQUIRES THAT A PARTY'S MOTION FOR A NEW TRIAL ON DAMAGES BE GRANTED WHEN THERE ARE INCONSISTENT ANSWERS TO SPECIAL VERDICT INTERROGATORIES?

The Seventh and First Circuits say No.
The Fifth and Fourth Circuits say Yes.

III. WHETHER COURTS ARE REQUIRED TO CONSIDER RULES 46 AND 51 TO BE READ CONJUNCTIVELY WHEN DETERMINING THAT A PARTY HAS WAIVED ANY RIGHTS FOR A NEW TRIAL?

The Seventh Circuit says No.
The First and Third Circuits say Yes.

PARTIES

Petitioner is Sheila Sims, a black woman, who has been employed with the City of Madison Police Department since 1975 and has worked as a Parking Monitor since March 16, 1980.

Respondent is John Mulcahy, who was employed with the city of Madison Police Department as a Patrol Officer on June 8, 1985 and currently is employed as a Detective.

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SHEILA SIMS,

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v.

JOHN MULCAHY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circle entered in this proceeding on May 9, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the United States District Court for the Western District of Wisconsin is reported in 902 F.2d 524 (1990), and is reprinted at App. 1 to App. 42 of the Appendix to this Petition.

The Judgment and opinion of the United States District Court for the Western District of Wisconsin (No. 88C-524-S) dismissing the action and denying Petitioner's request for an award of nominal damages as a question of law or in the alternative granting her motion for a new trial are reprinted at App. 43 to App. 50 of the Appendix to this Petition. The special verdicts of the jury both for liability and damages, as well as the specific question of the jury are reprinted at App. 51 to App. 54 of the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1990. This petition for a writ of certiorari has been timely filed within the period allowed pursuant to Rule 13, Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. Section 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

> party injured in an action at law, suit in equity, or other proper proceeding for redress.

The constitutional right protected involved is the Fourth Amendment – unreasonable searches and seizures as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On June 8, 1985, respondent entered petitioner's apartment without her knowledge. This action went to a bifurcated trial before a jury on January 3-4, 1989 with respect to liability and on January 6, 1989 with respect to damages. The Court found that respondent was not entitled to qualified immunity as a matter of law and the jury was asked in a special verdict whether respondent deprived petitioner of her Fourth Amendment rights by entering her apartment on June 8, 1985. The jury answered in the affirmative. The jury further was queried as to whether petitioner was treated differently than non-minority persons by virtue of respondent's entry into her apartment on June 8, 1985. Its answer to this latter interrogatory was "No." (App. 51.)

On January 6, 1989, the damages segment of the trial was conducted before the jury. The special verdict question before the jury was a composite question: "What sum

of money will fairly and reasonably compensate the plaintiff for any damage caused by defendant Mulcahy's unconstitutional entry into her apartment?" (App. 53.) Petitioner's counsel objected to the form of the special verdict in that it: a) failed to provide the jury with a reasonable understanding of the types of components – damages, which it should be considering; b) would have the impact of short changing the results by lumping all types of damages into one area; and, c) would make it very difficult for the jury to deliberate as to exactly what damages they could compensate petitioner. (App. 55.)

During the bench conference regarding the jury instructions, petitioner's counsel requested specifically that the jury be given an instruction with respect to loss of reputation and community humiliation. (App. 59-60.) The Court declined. (App. 59.)

In its second conference regarding jury instructions, the Court itself became confused in discussing the combined instruction relating to nominal damages and compensatory damages. (App. 57-58.)

While it was deliberating, the jury sent a question to the Court as follows:

> "On Question #1 is there a *required minimum amount*?"
>
> /s/ Emma Westphal,
> Foreperson

The Court conducted a conference with respect to this question; petitioner's counsel requested that the Court provide the jury with the jury instruction that included the compensatory nominal instruction along with its

answer of "No." The Court declined to do so. (App. 54.) (Jury instructions were read orally to the jury before initially retiring on the damages interrogatory; none of the instructions were provided to the jury in writing.)

The jury awarded zero damages to Petitioner and the Court dismissed the case. (App. 50.)

The response submitted to the jury was as follows:

> "Members of the jury, no, in answer to your question."

On January 17, 1989, Petitioner timely filed a Motion for a New Trial or in the alternative a Motion To Amend Judgment. The court denied petitioner's motions on February 16, 1989. (App. 43-49.)

The petitioner, a black woman, has been employed with the City of Madison Police Department since 1975 and specifically as a Parking Monitor since March 16, 1980. On Saturday, June 8, 1985, Respondent Mulcahy was employed as an Officer with the Madison Police Department and petitioner was scheduled to report to work at 7:45 a.m.; she was approximately 40 minutes late. The United States District Court for the Western District of Wisconsin had jurisdiction of this action pursuant to 28 U.S.C. Section 1343 secured by the Fourth Amendment of the United States Constitution, as well as 42 U.S.C. Sections 1981 and 1983. Jurisdiction was granted by the district court pursuant to 28 U.S.C. Section 1331.

Petitioner brought a timely appeal to the United States Court of Appeals for the Seventh Circuit and the Seventh Circuit issued its decision on May 9, 1990, affirming the judgment entered in the district court. (App.

1-42.) Appellate jurisdiction was alleged pursuant to 28 U.S.C. Section 1291 and Rule 4 Fed. R. Appl. Pro. The Seventh Circuit affirmed the dismissal of petitioner's claims under 42 U.S.C. Section 1983 and the Fourth Amendment, holding that the petitioner had waived her absolute right to nominal damages because counsel had not objected to the statement in the jury instruction that stated:

> "Even if you find plaintiff is entitled to no compensatory damages, however, you may still award plaintiff nominal damages of up to one dollar for the violation of her constitution right by any individual defendant." (App. 56.)

REASONS FOR GRANTING THE WRIT

I. NOMINAL DAMAGES SHOULD BE AWARDED AS A MATTER OF LAW WHEN THE JURY IN A BIFURCATED TRIAL HAS FOUND THAT THERE HAS BEEN A CONSTITUTIONAL DEPRIVATION UNDER 42 U.S.C. SECTION 1983.

This Court's landmark decision on the issue of nominal damage awards for deprivation of constitutional rights under 42 U.S.C. Section 1983 was issued in *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) when it stated at *Id*, 267:

> "We therefore hold that if, upon remand, the District court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners."

In arriving at its conclusion, this Court examined the legislative history of Section 1983, enacted as Section 1 of the Civil Rights Act of 1871, 17 Stat. 13 and reiterated its decision in *Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976) that the history of Section 1983:

> " . . . demonstrates that it was intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution."

In *Carey* at 266, the Court further stated:

> "Common-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights."

The majority of circuits have attempted to follow *Carey's* holding and have applied common-law rules of damages to provide fair compensation for injuries caused by the deprivation of constitutional rights; this Court reiterated approval of this approach in *Memphis*

Community School Dist. v. Stachura, 477 U.S. 299, 306, 106 S. Ct. 2537, 2542, 912 L.Ed.2d 249 (1986).[1]

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[1] In comment a, Restatement of the Law, Torts 2d, it states:

"The second purpose of the law of torts, that is, to determine or to assert rights, results from the inability of the common law to settle controversies before some wrongful act has been done. The existence of other remedies for testing rights, such as equitable proceedings and declaratory judgments, does not displace the common law remedy of granting nominal damages. These damages are a frequent consequence of actions brought merely to determine or to assert rights."

Section 907, Nominal Damages, *Id.* explains:

"Nominal damages are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages.

Comment: a . . . Nominal damages are to be distinguished from compensatory damages on the one hand and from punitive damages on the other, in that they are granted irrespective of harm to the complainant of a bad state of mind on the part of the defendant. They are given neither to compensate the plaintiff nor to punish the defendant. They may be awarded although the plaintiff has suffered no harm and although the defendant was not negligent and intended no invasion of another's rights . . .

Nominal damages can be awarded in cases in which a person has sought to recover significant damages and has failed to prove significant harm, provided that a cause of action is made out without proof of compensatory damages.

In this case, the jury found that petitioner's constitutional rights had been violated by respondent's entrance into her apartment when she was approximately forty (40) minutes late for work on Saturday, June 8, 1985. However, the jury did not award petitioner any damages and the Court, therefore, dismissed the case. This dismissal is contrary to the usual application of the common law of torts. As set forth in *A Treatise on the Law of Damages*, by Jabez Gridley Sutherland, (3rd ed. John R. Berryman, ed.) 1903 Chicago: Gallaghan and Company, p. 30, the common law rules would grant petitioner a new trial:

> "Section 11. The right a substantial one; new trials. The court will add nominal damages to the finding of a jury when necessary to such rights, as to carry costs. So where judgment should have been given for plaintiff for nominal damages, but as rendered for defendant, it will be reversed if such damages will entitle the plaintiff to costs; otherwise a judgment which is erroneous only because it fails to award plaintiff nominal damages will not be reversed, nor will a new trial be granted. . . . And if the object of the action is to determine some question of permanent right, and through error the plaintiff is deprived of the judgment he is entitled to, the fact that he can recover only nominal damages will not be reason for denying a new trial.
>
> footnote [1] . . . If the judgment is reversed because of error in the instructions the appellate court will direct judgement for a nominal sum for the plaintiff, it being clear that he is entitled to nominal damages."

Wisconsin common law as it existed in 1871 was consistent with the rules as cited in *Sutherland*. (See *Eaton v. Lyman*, 30 Wis. 41 (1872); *Cronemillar v. Duluth-Superior*

Milling Company, 134 Wis. 248 (1908). In *Hicks v. Brown Group, Inc.* 902 F.2d 630, 653 (8th Cir. 1990), the Eighth Circuit Court held:

> "Because proof of a violation of Section 1981 automatically entitled Hicks to nominal damages regardless of the district court's additur of $1.00 nominal damages, we find that the district court did not err in using additur to clarify the legal consequences (e.g., presumed nominal damages) of the jury's findings of discrimination in violation of Section 1981."

In *Sims*, the jury was given special verdicts to ascertain liability – deprivation of a constitutional right (App. 51.) and to determine the amount of damages which would fairly compensate petitioner. Under Rule 49a, it was up to the Court to then apply the jury's findings of fact to issuing its final judgment. The procedure places the responsibility with the trial judge to apply the appropriate legal principles to the facts found by the jury. Accordingly, the Court should have awarded petitioner nominal damages between $.01 and $1.00 as nominal damages for the deprivation of her Fourth Amendment constitutional rights; with said judgment having the effect of enabling her to recover costs and attorneys fees for this action.

II. RULE 49a REQUIRES THAT A PARTY'S MOTION FOR A NEW TRIAL ON DAMAGES BE GRANTED WHEN THERE ARE INCONSISTENT ANSWERS TO SPECIAL VERDICT INTERROGATORIES.

It is established law that inconsistent answers to interrogatories cannot stand. *Gallick v. Baltimore and Ohio*

R.R., 372 U.S. 108, 119, 83 S. Ct. 659, 666, 9 L.Ed.2d 618 (1963). At the present time, the circuit courts appear divided on the issue of preserving the right to a new trial when the jurors have returned inconsistent answers to interrogatories. In *Mercer v. Long Mfg.*, 671 F.2d 946, 947-948 (5th Cir. 1982), the Court held that it is not necessary to demand that the Court have the jury deliberate further when inconsistent answers to interrogatories are returned. When there are inconsistent answers, a party is entitled to a new trial upon filing a motion. The Fourth, Fifth and Third circuits appear to follow this approach. However, other circuits do not. See *Skillen v. Kimball*, 643 F.2d 19 (1981.)

Although petitioner timely requested a new trial at the district level on January 17, 1989 (App. 43-49) and also raised the issue in her Brief before the Seventh Circuit Court of Appeals, the decision of the circuit court side-stepped this issue by asserting that petitioner did not preserve her right since she had not properly objected to the the jury instruction. See section immediately following.

III. COURTS ARE REQUIRED TO CONSIDER RULES 46 AND 51 TO BE READ CONJUNCTIVELY WHEN DETERMINING THAT A PARTY HAS WAIVED ANY RIGHTS FOR A NEW TRIAL.

The Seventh Circuit Court of Appeals held that petitioner had waived her rights to a new trial because she had not properly objected to the combined Damages – Compensatory and Nominal jury instruction. However, the Court of Appeals did not acknowledge that petitioner had properly objected to the form of the special verdict

(App. 55.) The same argument to which the trial court was alerted to with respect to the form of the special verdict applied to the combined instruction (App. 56.) The trial court itself became confused with respect to the combined instruction. (App. 57-78.) Petitioner requested that the trial court send the jury instruction to the jury with the trial court's response to the jurors' question (App. 54.) However, the trial court refused to do so.

The trial court also refused to instruct the jurors with respect to petitioner's requested instruction on damages for community humiliation and loss of reputation (App. 59-60.) Petitioner was particularly conscious of the need for this instruction. Culturally she does not subscribe to the philosophy of consulting with psychotherapists. As a result, she had no expert to testify regarding her feelings of humiliation. Rather, she had to rely on the observations of her co-workers, relatives and friends. In this situation where she isolated herself from her colleagues for fear that they might be disciplined for associating with her coupled with the snide remarks made by the officers at the police station about entering her apartment without notice warranted that this instruction be given to the jury. However, the trial court refused to provide the instructions by multiple elements as identified in *Carey v. Phiphus*, 435 U.S. 247, 265, 98 S. Ct. 1042, 55 L.Ed. 2d 252, at footnote 22.

In *Green v. Reading Co.*, 183 F.2d 716, 719 (3rd Cir. 1950), the Court held:

> "Rule 51, which requires an objection 'before the jury retires to consider its verdict' must be read with Rule 46, which provides that 'it is sufficient that a party, at the time the ruling or order of the

> court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor. . . . "

(See 5A J. Moore and J. Lucas, *Moore's Federal Practice*, Paragraph 46.01 (2d ed. 1982), 9 C. Wright & A. Miller, *Federal Practice and Procedure*, Section 2553 at 639-640 (1971); *Bowley v. Stotler & Co.*, 751 F.2d 641 (3rd Cir. 1985).)

As stated by the First Circuit in *Krock v. Electric Motor & Repair Company*, 327 F.2d 313 (1st Cir. 1964) quoting, *Keen v. Overseas Tankship Corp.*, 194 F.2d 515, 519, *cert. den.* 343 U.S. 966, 72 S. Ct. 1061, 96 L.Ed. 1363 (2nd Cir. 1952):

> " 'Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided."

It appears that the Seventh Circuit felt that petitioner should have objected to the language in the instruction, which indicated that the jury may award up to one dollar. There is nothing wrong with that language per se. It is consistent with the language of *Carey, supra*, p. 267:

> " . . . We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners." [Emphasis added.]

The error of the trial court was as correctly pointed out by petitioner, the lumping together of all of the elements of damages for which petitioner was entitled to be compensated and utilizing the language "amount" and "compensated" for in conjunction with the *single* question

that was to include nominal damages. Petitioner correctly objected to the form of the special verdict and again reiterated her objection to the composite instruction by requesting that the instruction be sent to the jury with the answer to the jurors specific question because of the trial court's failure to break down the damages special verdict into its component parts.

CONCLUSION

Petitioner is entitled to nominal damages as a question of law and respectfully requests that this Court grant this petition to resolve the issue of additur for nominal damages among the circuits. Petitioner further requests that this court grant her petition to unify the position of the various circuits in granting a motion for a new trial when there are inconsistencies in interrogatories. Finally, petitioner respectfully asks that this Court clarify for the Seventh Circuit that Rule 46 and Rule 51 must be read conjunctively.

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Alternatively, the petition should be granted summarily, the decision of the Seventh Circuit should be vacated, and the case should be remanded for a new trial

on damages in the United States District Court for the Western District of Wisconsin.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

Nos. 89-1523, 89-1639

SHEILA SIMS,

Plaintiff-Appellant,
Cross-Appellee,

v.

JOHN MULCAHY,

Defendant-Appellee,
Cross-Appellant,

and

CITY OF MADISON,
THOMAS HISCHKE,
ROBERT PETERSON,
JEROME GARTNER,
ROBERT BIRRENKOTT and
PAUL ANDERSON,

Defendants-Appellees.

Appeals from the United States District Court for
the Western District of Wisconsin.
No. 88-C-524—**John C. Shabaz,** *Judge.*

ARGUED DECEMBER 5, 1989—DECIDED MAY 9, 1990
902 F.2d 524 (7th Cir. 1990)

Before COFFEY, RIPPLE, *Circuit Judges,* and DUMBAULD, *Senior District Judge.**

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* The Honorable Edward Dumbauld, Senior District Judge for the Western District of Pennsylvania, is sitting by designation.

COFFEY, *Circuit Judge.* Plaintiff-Appellant, Sheila Sims, brought this action under 42 U.S.C. §§ 1981 and 1983, alleging that Defendants-Appellees, the City of Madison, John Mulcahy, Thomas Hischke, Robert Peterson, Jerome Gartner, Robert Birrenkott and Paul Anderson, violated 42 U.S.C. § 1981, as well as the fourth and fourteenth amendments to the United States Constitution in disciplining her for tardiness, in entering her apartment to ascertain her physical well being in connection with one particular incident of tardiness and in subjecting her to racial harassment. The district court entered summary judgment in favor of all defendants on all of the relevant claims except for the claims against John Mulcahy and Paul Anderson with respect to their entry of Sims' residence. Sims proceeded to trial against Mulcahy and Anderson, and a jury found that Mulcahy violated the fourth amendment to the United States Constitution in entering Sims' apartment.[1] However, the jury found that the entry was not racially discriminatory under the Fourteenth Amendment's Equal Protection Clause or 42 U.S.C. § 1981. Following a subsequent trial on the issue of damages, the jury determined that Sims was not entitled to any damages for Mulcahy's entry of her apartment. As a result of Sims' failure to obtain any relief, judgment was entered in favor of Mulcahy and all other defendants dismissing Sims' action with prejudice. Sims appeals from this judgment, while Mulcahy cross-appeals from the district court's refusal to grant him qualified immunity. We affirm.

I.

FACTS

Sheila Sims is a black woman who has been employed by the City of Madison, Wisconsin, since 1975. Sims has worked as a parking monitor for the City's police department since 1980.

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[1] The jury found that Paul Anderson did not violate the Constitution in entering Sims' apartment.

Sims has evidenced a problem with oversleeping that has resulted in a number of reported incidents of tardiness over the years she has been employed as a parking monitor. The City of Madison, Wisconsin, Police Department has a written policy in Section 2-1817 of its Policies and Procedures Manual which provides as follows: "Members of the Department shall be punctual in their reporting for duty at the time designated by their superior officers. Habitual failure to report promptly at the time directed will be deemed neglect of duty." As further defined by the Department's custom and practice, the first instance of tardiness within a 12-month period results in a letter of understanding, two incidents within six months result in a letter of reprimand, and three incidents within a year result in a one-day suspension. Over the years Sims has worked for the Madison Police Department, Sims' tardiness record reveals a number of instances of tardiness that, in the district court's words, have resulted in "a record of tardiness unrivaled by any of her co-workers." *Sims v. City of Madison*, No. 88-C-524, Memorandum and Order on Summary Judgment at 17 (W.D. Wis. December 19, 1988). We reproduce Sims' tardiness record below:

Date	Time Tardy	Disciplinary Action	Officers Involved
4/3/80	6 minutes	AWOP[2] .09 verbal counseling	Sgt. Birrenkott
5/1/80	a few minutes		Sgt. Mallov
5/5/80	10 minutes	AWOP .16 verbal counseling	Sgt. Mallov
5/6/80	10 minutes	AWOP .16 verbal counseling	Sgt. Mallov

[2] AWOP denotes absent without pay and the number following each AWOP notation reflects the hours or fractions thereof that Sims was absent without pay. Furthermore, the tardiness of June 8, 1985, was excusable by virtue of a public bus delay, an excuse the Madison Police Department routinely accepts for tardiness.

Date	Time Tardy	Disciplinary Action	Officers Involved
7/23/80	10 minutes	AWOP .16 verbal reprimand & documentation of tardiness pattern, dated 7/24/80	Sgt. Birrenkott
7/25/80	8 minutes	AWOP .13 letter of reprimand, dated 8/18/80 (concerns 8/8/80 incident as well)	Sgt. Birrenkott Sgt. Ninneman
8/8/80	4 minutes	AWOP .07 letter of reprimand dated 8/18/80	Sgt. Birrenkott Sgt. Ninneman
6/12/82	5 hours	AWOP 5.00 verbal reprimand	Sgt. Birrenkott
2/27/84	5 minutes	AWOP .08 verbal reprimand	Sgt. Birrenkott
2/6/85	8 minutes	AWOP .13 verbal reprimand	Sgt. Birrenkott
6/8/85	40 minutes	AWOP .67 letter of reprimand dated 6/12/85	Sgt. Birrenkott Lt. Peterson
11/15/85	1 hour, 30 minutes	credited for .75 hrs. based on time and a half overtime rate (worked .50 hours rather than 2 hours overtime as required) letter of reprimand dated 12/5/85	Sgt. Birrenkott Lt. Peterson
12/2/85	40 minutes	AWOP .67 no discipline - see letter dated 12/5/85	Sgt. Birrenkott

Date	Time Tardy	Disciplinary Action	Officers Involved
5/6/86	4 minutes	AWOP .07 1-day suspension, given 6/13/86	Sgt. Birrenkott Lt. Peterson Lt. Hughes
6/1/87	1 hour, 35 minutes	AWOP 1.58 letter of reprimand dated 6/26/87	Lt. Peterson

In her attempts to establish the City's racially discriminatory application of its tardiness policy, Sims compared her tardiness to that of Sharon Benson, a white woman employed as a parking monitor for the City of Madison. Benson had presented to the police department a physician's statement in September 1981 that indicated that she had been diagnosed as manic-depressive, a factor in her tardiness. Benson's tardiness record over the same period as Sims was the following:

Date	Time Tardy	Disciplinary Action	Officers Involved
10/13/80	30 minutes	AWOP .50 verbal counseling	Sgt. Birrenkott
12/1/80	5 minutes	AWOP .08 verbal reprimand	Sgt. Birrenkott
2/13/81	15 minutes	AWOP .25 verbal reprimand	Lt. Johnson
9/12/81	50 minutes	AWOP .83 (physician's slip)	Sgt. Gritzmacher
10/5/81	5 minutes	AWOP .08 verbal reprimand	Sgt. Birrenkott Lt. Johnson
10/12/81	20 minutes	AWOP .33 documented counseling session dated 10/13/81	Sgt. Birrenkott

Date	Time Tardy	Disciplinary Action	Officers Involved
7/25/83[3]	1 hour, 45 minutes	AWOP 1.75, written reprimand (includes 8/6/83 incident) (note: Benson called in, but was denied compensatory time)	Sgt. Birrenkott Lt. Johnson Capt. Hischke
8/6/83	2 hours 48 minutes	AWOP 2.80 written reprimand	Sgt. Birrenkott Lt. Johnson Capt. Hischke
2/28/86	3 minutes	credited for 2.93 hours, based on time and a half overtime rate (worked 1.95 hours rather than 2 hours overtime as required)	Sgt. Birrenkott

Sims also compared her tardiness record to that of Theresa Johnson Bultman, apparently a white woman, who had incidents of .75 hours' tardiness, 5.5 hours' tardiness and 1.75 hours' tardiness during the year 1980. There is no record of any written reprimand concerning this tardiness.

The response of the police department to Sims' June 8, 1985, tardiness is particularly significant to this case. On that date Sims did not report at her required 7:45 a.m. reporting time. Even though Sergeant Jerome Gartner, the officer-in-charge, was acting as Sims' immediate supervisor that day he was not Sims' regular supervisor and was unaware of Sims' employment history and her prior tardiness record. Because Sims failed to notify the department of her tardiness prior to her 7:45 a.m. reporting time, Sergeant Gartner asked parking monitors Debra

[3] Because Benson called to notify the Department prior to her tardiness, under normal Department policy the July 25, 1983, tardiness is not considered by the police department as an instance of tardiness.

Foster and Sharon Benson why Sims had not reported to work at 7:45. Benson told Gartner that Sims had been having some problem with oversleeping and that Sims was somewhat depressed. Gartner then telephoned Sims' residence but was unable to make contact with her. Officer John Mulcahy reported to Gartner around 8 a.m., and Gartner advised Mulcahy that Sims was absent and that he was concerned about her. Officer Mulcahy was also unfamiliar with Sims' work and tardiness records. Sergeant Gartner told Mulcahy that he would again attempt to make contact with Sims via telephone, but that if he was unable to contact her he might ask Mulcahy to check Sims' residence. At that time he gave Mulcahy the address of Sims' residence. Gartner attempted unsuccessfully to contact Sims a second time via telephone. Gartner next notified the dispatcher that Officer Mulcahy should check Sims' residence but did not request that Mulcahy enter Sims' apartment.

Upon arriving at Sims' apartment building, Mulcahy knocked on Sims' apartment door and at this time encountered Paul Anderson, the resident manager of Sims' apartment building. Anderson asked Officer Mulcahy if he could be of assistance and Mulcahy stated that Sims, an employee of the police department, had not arrived for work and that Mulcahy was attempting to determine whether she was at home. Anderson told Officer Mulcahy that he had a pass key for the apartment and asked if Mulcahy wished to go inside Sims' apartment to verify whether Sims was present. Officer Mulcahy hesitated at first but speculated privately as to whether Sims might have been injured or ill inside the apartment and was of the opinion that a quick search of the apartment would be appropriate. Anderson unlocked the apartment door for Officer Mulcahy who entered the apartment, looked at the areas he could easily observe and departed from the premises. Officer Mulcahy neither filed a report contemporaneously nor otherwise advised others within the police department that he had entered Sims' apartment.

No evidence was presented during trial of any written Madison Police Department policy concerning the questions of dispatching officers to a tardy employee's home or entry into that employee's home. Sergeant Gartner did testify that the officer-in-charge considers the relevant circumstances in determining whether a tardy employee's residence should be checked and testified that the information he received from Parking Monitor Sharon Benson concerning Sims' present problems of oversleeping, depression and tardiness were matters he considered in directing Officer Mulcahy to check Sims' apartment. Sergeant Gartner also testified that on two separate prior occasions he had sent officers to check the residences of other tardy employees. With respect to entering a tardy employee's residence, Police Captain Thomas Hischke testified that the department follows the same legal standards (i.e., the U.S. Constitution) concerning whether an employee's residence should be entered as in the case of entry of a residence occupied by a member of the general public. For example, a residence might be entered if there were exigent circumstances justifying entry or the consent of the residence's occupant. Police Captain Thomas F. Hischke recalled that a white male police officer's residence had been entered in a case where the officer was tardy and had a history of personal problems.

Previously Sims had filed an employment discrimination charge with the Wisconsin Department of Industrial Labor and Human Relations, Equal Rights Division, on July 3, 1985, alleging that she had suffered racial discrimination in connection with the discipline for her tardiness and the entry into her dwelling. Following the City's receipt of the discrimination charge, Police Inspector Edward E. Daley requested that Police Sergeant Sylvester Combs conduct an interview with Officer Mulcahy concerning the entry of Sims' residence. Combs interviewed Mulcahy on July 14, 1985, and, in a memo to Inspector Daley, described the events of the day including his entry into Sims' apartment. In the interview, Mulcahy stated that he was in the apartment for only one minute, did not

touch anything in the apartment and was interested only in checking on Sims' personal welfare. Mulcahy also stated that he had received no instructions from Sergeant Gartner to enter Sims' apartment and did so only after being approached by the apartment manager. Mulcahy further told Combs that he was of the opinion that his conduct was not in violation of the law. Inspector Daley requested that Combs conduct a second interview of Mulcahy concerning the questions of how long he was inside Sims' apartment and his actions while inside Sims' residence. In this interview, recorded in a July 19, 1985, memo, Mulcahy stated that the landlord opened the door and stood just inside the door while Mulcahy made a "cursory inspection of the apartment." Inspector Daley then requested that Combs interview Paul Anderson, the resident manager of the building in which Sims' apartment was located, as well as Sharon Benson and Debbie Foster, the two parking monitors who were also scheduled to work on the date when Sims' apartment was entered. Combs' September 3, 1985, memo to Daley contained summaries of these interviews. According to the report, Anderson stated that he observed Mulcahy ringing the doorbell to Sims' apartment and, upon learning that Mulcahy was attempting to check on Sims' welfare, told Mulcahy that he had the pass key to the apartment and would open the door if Mulcahy wished him to do so. Anderson related that Mulcahy hesitated but then stated that as long as he was here he would make sure that nothing was wrong (concern about her physical well-being) inside the apartment. According to Anderson, Mulcahy entered the apartment, walked to the back of the apartment, looked through the door to one of the bedrooms and then exited. In Anderson's opinion, Mulcahy was not in the apartment for more than 30 seconds. Based upon his interviews Combs stated that Mulcahy and Paul Anderson had, in fact, entered Sims' apartment on June 8, 1985, and that Mulcahy and Anderson did not have Sims' permission to enter her apartment. Further, Combs concluded that Mulcahy was sent to the residence solely to contact Sims and

was not sent to search the apartment. In Combs' opinion, "[t]he reason for the entry into the apartment was the fact that Anderson just happened to appear on the scene and had the master key to all the apartments" and that Mulcahy "felt that as long as he was at the scene he would ascertain that Sims was not in any danger." In conducting the investigation Combs contacted Mulcahy, Anderson and the two parking monitors but did not interview Sergeant Gartner, the officer who had dispatched Mulcahy to Sims' residence. The reason for his not interviewing Gartner was because the two sergeants' vacation schedules made a meeting difficult.

Sims further alleged that she was subject to various forms of harassment based upon her race. For example, Sims complains that Police Sergeant Birrenkott told her in March 1986 not to use the typewriters in the Administrative Services Area on her lunch hour or after hours to practice for a City typing test. Furthermore, when Sims attempted to check the anniversary date of her employment with the payroll department, the Police Chief's secretary complained to one of Sims' supervisors that Sims was "goofing off." In addition, Sims complains that "[o]n a Saturday in 1985, shortly after the June 8, 1985, entrance into my apartment by Officer Mulcahy, Sgt. Jerome Gartner told me that he 'was about to send someone out to look for me.' " Sims also complained that she was subject to sarcastic jokes and ridicule from fellow officers after Mulcahy had entered her residence. These included statements like: "Let's go out to Sheila's house; we don't have to call first; we can just go." Sims also complained that even though she had difficulties with her radio equipment, she still received negative evaluations for her apparently tardy radio responses. Sims believes that these incidents, combined with the unequal application of the City's tardiness policies and the entry into her residence, created a racially hostile working environment.

II.

MULCAHY'S MOTION *IN LIMINE*

The district court granted Mulcahy's motion *in limine* excluding evidence during the trial relating to Mulcahy's involvement in the termination of another black parking monitor, James Washington. Washington's employment was allegedly terminated after Mulcahy wrote a memorandum stating that he had witnessed Washington's theft of 7/10ths of a gallon of gasoline. In granting Mulcahy's motion *in limine* the district court stated: "The Court doesn't believe that the circumstances involving Washington are even within hailing distances of each other. The Court believes if indeed there is anything probative as it concerns the Washington incident, again, it is outweighed by the misleading nature." On January 3, 1989, the district court made clear that the motion *in limine* related to any evidence relating to the employment, discipline and termination of Washington's employment in refusing to receive as an exhibit the memorandum Mulcahy wrote concerning Washington's gasoline theft. The Court stated:

> "The Motion *in limine* was granted as it relates to Washington, and accordingly, the objection to Exhibit No. 74 would then be relevant, and Exhibit 74 would not be received as a result of the granting of the Defendant's Motion *in limine*. All the exhibits have been received, except for those which have been specifically excluded by the Court . . . for relevance. . . . [T]he Motion *in limine* as it related to Washington was granted, and accordingly, 74 would then be excluded on the basis of relevance. The Court previously determined that if there indeed was . . . relevant testimony concerning Washington, it was far outweighed by [Rule] 403 considerations, so accordingly 74 is not received if it does indeed relate to the specific motion *in limine* to which the defendant Mulcahy has referred, and defendant Mulcahy has referred to that specific incident which is inclusive of Exhibit number 74."

Sims contends that the district court erred in granting the motion *in limine* because Mulcahy's involvement in the termination of Parking Monitor Washington's employment was relevant to demonstrating the racial animus that Sims alleged motivated Mulcahy's entry of her apartment. In reviewing a district court's determination to exclude evidence upon the basis that its probative value is outweighed by its prejudicial content under Fed. R. Evid. 403, we have noted that the question of "[w]hether the probative value of evidence is outweighed by the prejudice thereof is a matter left to the sound discretion of the trial court, and we will not reverse the court's determination absent a showing of abuse of that discretion." *United States v. Field*, 875 F.2d 130, 135 (7th Cir. 1989) (citations omitted). As we have also noted: "The balancing of probative value and prejudicial effect, like other comparisons of intangibles, requires an exercise of judgment rather than a computation. Only in an extreme case are appellate judges competent to second-guess the judgment of the person on the spot, the trial judge." *United States v. Krenzelok*, 874 F.2d 480, 482 (7th Cir. 1989). Exclusion of evidence under Rule 403 is also important to avoid significant litigation on issues that are collateral to those required to be tried. In a previous decision upholding the exclusion of evidence under Rule 403, we stated: "In effect the admission of Lyon's testimony may have very well necessitated a 'trial within a trial' concerning Swain's alleged actions *subsequent* to, and independent of, the assault at issue in this case and this 'trial within a trial' would have consumed a great deal of trial time and would have had slight probative value." *Jones v. Hamelman*, 869 F.2d 1023, 1027 (7th Cir. 1989) (emphasis in original).

The trial judge determined that the facts involving Parking Monitor Washington's termination of employment were far afield and unrelated to the facts and circumstances in this case. Although Sims alleges that the facts of Washington's termination were relevant to establishing Mulcahy's racial hostility, the evidence would be relevant for that purpose only if the termination of Washington's

employment was motivated by racially discriminatory reasons rather than the legitimate, non-discriminatory reason of gasoline theft. This determination would have effectively required a "trial within a trial" on the question of the legitimacy of Washington's termination. Because this evidence was of slight, if any, probative value, and any probative value it might have would have been established only following significant litigation within litigation concerning whether Washington's termination was motivated by discriminatory or non-discriminatory reasons, we hold that the district court's exercise of discretion was proper in granting the motion *in limine* excluding evidence concerning the termination of Parking Monitor Washington's employment.

III.

DAMAGES AGAINST MULCAHY

Although the jury found that Mulcahy's entry of Sims' apartment deprived Sims of her fourth amendment rights, the jury refused to grant Sims damages. Sims challenges this denial on two bases. Initially, Sims alleges that the district court's failure to provide her requested instruction concerning damages for injury to her reputation in the community resulted in an improper instruction affecting the jury's determination of compensatory damages. Secondly, Sims contends that the district court's failure to instruct the jury regarding the alleged mandatory requirement of an award of $1 of nominal damages for her constitutional injury and its failure to amend the judgment to award her $1 in nominal damages for her constitutional deprivation was also improper.

A.

COMPENSATORY DAMAGES FOR COMMUNITY HUMILIATION AND LOSS OF REPUTATION

We turn first to the district court's refusal to give Sims' jury instruction concerning "community humiliation and loss of reputation." Sims' proposed instruction read:

> "With respect to community humiliation and loss of reputation, the measure of damages is such sums as will compensate the plaintiff for the damage that has resulted from (the illegal entrance into her residence, differential application of discipline, harassment in her working environment).
>
> It is not required that the plaintiff prove damages by any financial yardstick measuring in dollars and cents. Injury to reputation, good name, and feelings are not subject to mathematical calculations or certainty. Further, it is not necessary for the plaintiff to prove that she suffered an actual out-of-pocket loss in order to substantiate damage to her reputation and good name."

The district court refused to give this instruction, stating:

> "The next item relates to those instructions which were suggested by the plaintiff which the Court finds there is no—there is legal basis for the instruction which is entitled community humiliation and the loss of reputation. None of that has been presented. There is no question that the case which has been cited—I'll also give you another one which is a prior case, *Bush v. Burke*, 648 F.2d 509, which was cited in . . . [*Crawford v. Garnier*, 719 F.2d 1317 (1983)]—community humiliation and loss of reputation are properly considered in determining compensatory damages 1983 claims. The Court did provide some attention to that. Believe that and believe that it is not appropriate."

Although the court refused to provide the jury with the instruction regarding community humiliation and loss of reputation that Sims requested, it did in fact instruct the jury in detail concerning the propriety of awarding damages for any pain, suffering and mental anguish Sims allegedly suffered as a result of Mulcahy's constitutional violation. In its instruction on compensatory damages the court stated: "You should determine what sum of money will fully compensate the plaintiff for any pain, suffering

and mental anguish that was proximately caused by the defendant's violation of the plaintiff's rights. These damages are known as 'compensatory damages.' " In addition, the court provided the jury with a specific instruction concerning pain, suffering and mental anguish:

> "In arriving at the amount of the award you should include a sum which will compensate plaintiff reasonably for (1) any pain, suffering and mental anguish already suffered by her and proximately resulting from the action in question; and (2) any pain, suffering and mental anguish which you find from the evidence in the case that she is reasonably certain to suffer in the future from the same cause.
>
> In this connection you may take into account, and you should take into account, plaintiff's interest and past way of life and you may allow for any loss of enjoyment of life for any emotional strain or mental suffering which you find proximately resulted from the actions of the defendant."

In the damages phase of her trial Sims presented evidence that she felt violated and humiliated as a result of the entry into her apartment. Furthermore, she testified that police department personnel publicly ridiculed her with comments like: "Let's go to Sheila's house, we don't have to call first." Sims cites no other evidence of how her reputation in the community might have suffered as a result of Mulcahy's entry into her apartment.

In a recent case involving the question of whether a court's jury instructions adequately presented every aspect of a plaintiff's civil rights claim, we observed:

> "When reviewing a challenge to a jury instruction, we must view the instruction as a whole and consider the challenged instruction 'both in the context of the other instructions given and in light of the allegations of the complaint, opening and closing arguments and the evidence of record.' *General Leaseways Inc. v. National Truck Leasing Ass'n*, 830 F.2d 716, 725 (7th

> Cir. 1987); *see also Fisher v. Krajewski*, 873 F.2d 1057, 1064 (7th Cir. 1989); *Vaughn v. Willis*, 853 F.2d 1372, 1376 (7th Cir. 1988). The instructions must be construed in a ' "common sense manner, avoiding fastidiousness, inquiring whether the correct message was conveyed to the jury reasonably well." ' *General Leaseways*, 830 F.2d at 725 (quoting *Wilk v. American Medical Ass'n*, 719 F.2d 207, 218 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210, 104 S. Ct. 2398, 81 L.Ed.2d 355 (1984)). Moreover, . . . we must keep in mind ' "the artificiality of assuming that isolated passages in a lengthy set of instructions are apt to spell the difference between victory and defeat." ' *Id.* (quoting *W. T. Rogers Co. v. Keene*, 778 F.2d 334, 342 (7th Cir. 1985)); *see also id.* ('Just as an allegedly erroneous instruction must be viewed in the context of the full charge and other surrounding circumstances, an allegedly erroneous omission of a sentence must also be viewed in context')."

Lynch v. Belden and Co., Inc., 882 F.2d 262, 267 (7th Cir. 1989). We have also noted that "[r]efusal of instructions on a party's theory of the case is not reversible error if the instruction given adequately presents the party's theory." *McDonald v. Sandvik Process Systems, Inc.*, 870 F.2d 389, 395 (7th Cir. 1989).

When we view the instructions in their entirety and not in isolation, it is apparent that the court's jury instruction was proper on the questions of damages based upon the "mental anguish," "loss of enjoyment of life," "emotional strain," and "mental suffering" that Sims allegedly suffered as a result of Mulcahy's entry into her apartment. The evidence Sims presented clearly would properly be considered within the afore-mentioned categories instead of the categories of "community humiliation" or "loss of reputation." Even Sims' reaction to the kidding she received from fellow officers would appear to most appropriately be described as examples of mental anguish or emotional strain rather than as examples of community humiliation or loss of reputation within the community.

Because the district court appropriately determined that there was virtually no evidence presented concerning damage to Sims' reputation and humiliation in the community and because Sims' alleged mental and emotional suffering was extensively covered in the instructions the court gave, we believe that the instructions given "adequately present[ed] [Sims'] theory," *McDonald*, 870 F.2d at 395, and that the failure to provide an instruction on community humiliation and loss of reputation does not rise to the level of reversible error.

B.

THE FAILURE TO AWARD NOMINAL DAMAGES

Sims further contends that the jury was improperly instructed and the jury committed error when it failed to return an award of $1 in nominal damages for Mulcahy's infringement of Sims' fourth amendment rights. Sims contends that an award of nominal damages is mandatory in any case where a jury has found that a constitutional right has been infringed. Thus, the jury should have been instructed that it was required to find damages and should have acted in conformity with such an instruction and awarded Sims these damages.

A review of the trial transcript demonstrates that Sims failed to raise this contention during the district court's jury instruction and special verdict conference. This conference was held on January 6, 1989, during the trial on damages. At issue during the conference was the following instruction relevant to both compensatory and nominal damages:

> "The special verdict form that you will receive before you begin your deliberations inquires about damages.
>
> You should determine what sum of money will fully compensate the plaintiff for any pain, suffering and mental anguish that was proximately caused by the

> defendant's violation of the plaintiff's rights. These damages are known as 'compensatory damages.' You are not permitted to award speculative damages. Do not include in any verdict compensation for any prospective loss which, although possible, is not reasonably certain to occur in the future.
>
> Even if you find plaintiff is entitled to no compensatory damages, however, you may still award plaintiff nominal damages of up to $1 for the violation of her constitutional right by any individual defendant."

At the conference the court also furnished counsel for the parties with the following special verdict question applicable to both compensatory and nominal damages:

> "1. What sum of money will fairly and reasonably compensate the plaintiff for any damage caused by defendant Mulcahy's unconstitutional entry into her apartment?
>
> ANSWER: $_____"

Sims raised no objections at the conference concerning the above instruction regarding nominal damages and failed to proffer an instruction of her own on this subject. Indeed, near the end of the instruction conference Sims' attorney in fact stated:

> "As it relates to the statements on the compensatory and nominal damages, *I do not think that that statement as it is in there is inconsistent with the law.* It simply indicates that the jury is entitled to award nominal damages. It doesn't say that there isn't any injury. It simply states that even if there are not compensatory damages [unclear] . . ."

(Emphasis added). The court's damages instruction, after ample opportunity to object and offer another instruction in its place, was, thus, sent to the jury without objection

from Sims on the subject of nominal damages.[4] Sims made one objection to the form of the special verdict question. Her attorney stated:

> "I am uncomfortable with the single question because I think in this case, based on prior case law, there is (sic) several types of damages, in addition to the emotional pain and suffering, there is also the community humiliation and loss of reputation and I had included with my proposed instructions information on *Crawford v. Kramer*, at 719 F.2d, 1370, 1983. It's a Wisconsin Jury Instruction that has been modified, number 2516. I think it's important for the jury to have a reasonable understanding of what types of components there are that they may be considering. I think this question tends to just lump it all as one area, and I feel that it may have the impact of short-changing. But more critically, also making it very difficult for them to deliberate as to exactly what it is they should be compensating for."

Nowhere in her objection to the special verdict was there a specific and clear objection stating that the special verdict must contain a statement that the jury was required to award nominal damages.

After the jury received the instructions and special verdict question and began their deliberations, the Court received a question from the jury regarding the special verdict. The court held a conference with the parties' attorneys that is recorded as follows:

> "THE COURT: . . . The Court has this question from the jury.
>
> On question 1 [of the special verdict], is there a required minimum

[4] Of course, as discussed in section III-A., *supra*, Sims did object to the compensatory damages instruction solely on the basis of its failure to include an instruction regarding community humiliation and loss of reputation.

amount? Signed by [phonetic] Ms. Westfeld. Is there any objection to the Court answering no and returning it to the jurors? Ms. Wagner?

MS. WAGNER: [Sims' attorney] I would prefer that the jury instruction that included the compensatory nominal instruction be sent with the answer no.

THE COURT: Mr. Armstrong?

MR. ARMSTRONG: [Mulcahy's attorney] I agree with the Court's suggestion of the answer no without any other information.

THE COURT: Well, I think that they do deserve to give the jurors a direct answer where the question is so easily answered and that is what I am going to answer. And question number 1 is there a required minimum amount? Members of the jury, no, in answer to your question."

As the above discussion reflects, even when directly confronted with the jury's question of whether there was a required minimum amount of either compensatory or nominal damages, Sims' attorney failed to even request, much less make a specific objection on the record stating the grounds therefor, nor offer an alternative instruction that the jury be advised that there was a required minimum nominal damages amount. Sims' attorney even went so far as to agree with the court answering the jury's question, "*No.*"

We recently emphasized the necessity for a party to raise any objections it might have to jury instructions prior to the time the jury begins its deliberations:

> "Rule 51 of the Federal Rules of Civil Procedure promotes judicial economy. It provides that '[n]o party may assign as error the giving or failure to give an instruction unless that party objects thereto before

> the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.' Fed. R. Civ. P. 51. The purpose of the objection is to give the trial court an opportunity to correct any errors it has made. Failure to properly object waives any challenge on appeal."

Bob Willow Motors, Inc. v. General Motors Corp., 872 F.2d 788, 794 (7th Cir. 1989). Not only must the party object to the jury instruction, its "objection must be sufficiently detailed to draw the court's attention to the defect [in the jury instruction]." *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1295 (7th Cir. 1987).

As detailed previously, Sims failed to bring to the district court's attention her contention that the jury should have been instructed that there was a mandatory requirement that nominal damages be awarded. Not only did Sims fail to bring this matter to the attention of the trial judge prior to the time the jury retired to consider its verdict, she again failed to advance, contrary to Federal Rule of Civil Procedure 51, this contention, much less the specific grounds therefor when the jury directly inquired of the court on this issue during the course of its deliberations. Indeed, Sims' attorney concurred with the court's answer that a minimum amount of damages need not be awarded. Furthermore, Sims' general objection to the combination of various damages components in a single special verdict question failed to alert and thus call to the court's attention her position that the jury was required to award some amount of nominal damages. Because Sims failed to advance any objection to the jury instructions or special verdict with the required specificity and the grounds therefor, contrary to Rule 51, she has waived her claim on appeal concerning the question of whether the jury was legally required to award nominal damages.

In an attempt to avoid a holding that her failure to object to the jury instructions and special verdict waived her right to challenge the jury's nominal damages verdict on appeal, Sims argues that the question of whether

the law required that she receive nominal damages is a legal question that cannot be waived as a result of a party's failure to request a proper and specific jury instruction or special verdict form. Trial judges must be impartial and are neither permitted, much less obligated, to assume an adversarial position in favor of either party in attempts to remedy a party's failure to request proper and specific jury instructions. We have held that "in civil cases a plain error doctrine is not available to protect parties from erroneous jury instructions to which no objection was made at trial." *Deppe v. Tripp*, 863 F.2d 1356, 1362 (7th Cir. 1988). Furthermore, party litigants' failure to object to an instruction given to them for inspection before the instructions are given to the jury precludes them from arguing that the jury's verdict was contrary to the appropriate legal standard. In *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 675 (7th Cir. 1985), we explained:

> "When a party does not ask for an instruction limiting the kinds of damages the jury may award (or informing the jury of the things it must find before it may award an item of damages), we may reverse the district court's denial of a judgment NOV only if no reasonable juror could have found the evidence sufficient under the instructions it heard. If a party could argue that the evidence was insufficient under the correct legal standard, this would be an indirect method of attacking the instructions, which we have just held defendants may not do. Once the law of the case is settled by failure to object to the instructions, the parties may argue only that the jury did not play its proper part. Because the jury's part is to apply the instructions to the facts, we may scrutinize its conclusions only to find out whether it did so."

See also Rakovich v. Wade, 850 F.2d 1180, 1192 (7th Cir. 1988) (*en banc*) ("Instructions not objected to become 'the law of the case' a limited doctrine that can affect our decision regarding a motion for judgment notwithstanding the

verdict. Here if the instructions given in the district court state the law of the case for purposes of the judgment notwithstanding the verdict determination, we cannot apply law at odds with those instructions.") (citation omitted). Because Sims did not object to the court's instruction that the jury "may . . . award plaintiff nominal damages of up to $1 for the violation of her constitutional right," and failed to present her own proper, tailored and specific instruction on this issue, the court's instruction was the law of the case. Especially in light of the jury's question to the court concerning whether a minimum amount of damages need be awarded and the court's answer, with all parties' consent, that no minimum amount was required, the jury clearly followed the court's instructions and acted properly in deciding not to award nominal damages. Thus, we hold that Sims' failure to challenge the jury instruction dealing with nominal damages waived her right to raise this question on appeal.[5]

IV.

LIABILITY OF THE CITY OF MADISON

Sims alleges that the district court should have found the City of Madison, Wisconsin, liable for violations of her rights under the fourth and fourteenth amendments to the United States Constitution, 42 U.S.C. §§ 1981 and 1983. The district court granted summary judgment in favor of the City of Madison, holding that the City was not liable for any of these alleged violations of Sims' constitutional or statutory rights.

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[5] In her reply brief Sims raised for the first time arguments that a new trial on damages should be ordered because the special verdict improperly confused the jury through its failure to isolate specific components of the damages available to Sims and because the jury's failure to award nominal damages was against the weight of the evidence. "Because [these arguments were] raised for the first time in the reply brief, [they] will not be considered." *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1295 n.7 (7th Cir. 1989).

In the district court Sims alleged that the City was responsible for constitutional and statutory violations involving discriminatory enforcement of tardiness policy, entry of her apartment and incidents of racial harassment that allegedly resulted in a racially hostile working environment. However, the record reveals that Sims failed to present any arguments dealing with the alleged racial harassment that resulted in a racially hostile working environment until her reply brief. "Because this argument was raised for the first time in the reply brief, it will not be considered." *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1295 n.7 (7th Cir. 1989). Thus, we are limited to the consideration of the question of whether the City can be held responsible for asserted violations of the fourth and fourteenth amendments to the United States Constitution and 42 U.S.C. §§ 1981 and 1983 resulting from the City's alleged racially discriminatory application of its tardiness policy and also its alleged responsibility for Mulcahy's entry into Sims' apartment. Although we affirm the district court's summary judgment that the City cannot be held liable for damages on these claims, we base our decision on grounds different from those relied upon by the district court. *See Patrick v. Jasper County*, No. 88-2152, slip op. at 18-19 (7th Cir. April 12, 1990) ("[I]t is well settled that '[i]n appeals from summary judgment, a reviewing court may affirm on any ground that finds support in the record.' ") (quoting *Donald v. Polk County*, 836 F.2d 376, 379 (7th Cir. 1988).

A.

City Liability Under 42 U.S.C. § 1981

Sims contends that the City violated 42 U.S.C. § 1981 because of its application to her of a racially discriminatory tardiness policy and because Mulcahy's entry into her apartment was based upon racially discriminatory grounds. In *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), the Supreme Court determined that 42 U.S.C. § 1981 generally does not provide an employee with a

remedy for an employer's actions that take place after an employment contract has been formed. The Court explained that the "right to make contracts" protected under 42 U.S.C. § 1981 "extends only to the formation of a contract, . . . not to problems that may arise later from the conditions of continuing employment." 109 S. Ct. at 2372. The Court also explained that:

> "The right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such post-formation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII."

Patterson, 109 S. Ct. at 2373. The Court also explained that section 1981's additional protection of the "rights to enforce contracts" "does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." *Id.* Both the City's alleged discriminatory tardiness policy and Mulcahy's entry into Sims' residence were employer actions that occurred significantly after the contractual relationship between Sims and the City of Madison had been formed and pertain to "the conditions of continuing employment matters more naturally governed by state contract law and Title VII"[6] and, thus, are not actionable under 42 U.S.C. § 1981 as construed in *Patterson*. *See also Lynch v. Belden & Co., Inc.*, 882 F.2d 262 (7th Cir. 1989) (holding that racial harassment claim "based on allegations that [the plaintiff] received discriminatory job assignments and was singled out because of his race, for special treatment by his supervisor . . . is

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[6] *Patterson*, 109 S. Ct. at 2373.

not actionable under section 1981"). Therefore, Sims had no cause of action against the City of Madison under 42 U.S.C. § 1981.[7]

B.

City Liability Under The Equal Protection Clause Of The Fourteenth Amendment, The Fourth Amendment And 42 U.S.C. § 1983

Sims is left with claims that the City of Madison violated the equal protection clause of the fourteenth amendment to the United States Constitution, the fourth amendment to the United States Constitution and 42 U.S.C. § 1983 as a result of the City's application to Sims of its allegedly discriminatory tardiness policy and Mulcahy's entry of Sims' apartment. We recently stated that:

> "In order for [Sims] to prevail on [her claims] brought pursuant to 42 U.S.C. § 1983, [she] must establish that: '(1) [she] held a constitutionally protected right; (2) [she was] deprived of this right in violation of the Constitution; (3) the defendants intentionally caused this deprivation; and (4) the defendants acted under color of [state] law.' *Donald v. Polk County*, 836 F.2d 376, 379 (7th Cir. 1988). Additionally, to hold [the City of Madison] liable under section 1983, [Sims] must demonstrate that the constitutional deprivation was caused by 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the City's] officers.'

[7] In light of our holding that Sims failed to present actionable claims under 42 U.S.C. § 1981, it is unnecessary for us to rule upon Sims' contention that the City could be held liable for § 1981 claims under a *respondeat superior* theory. However, for the elucidation of counsel we point out that the Supreme Court's recent decision in *Jett v. Dallas Independent School District*, 109 S. Ct. 2702 (1989), explicitly holds that a municipality may not be held liable for violations of 42 U.S.C. § 1981 under the theory of *respondeat superior*.

> *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978); *Bergren v. City of Milwaukee*, 811 F.2d 1139, 1142 (7th Cir. 1987)."

Patrick v. Jasper County, No. 88-2152, slip op. at 8 (7th Cir. April 12, 1990) (footnote omitted).

1. CITY LIABILITY UNDER THE EQUAL PROTECTION CLAUSE AND 42 U.S.C. § 1983

As stated above, an essential element of recovery under 42 U.S.C. § 1983 is the demonstration of a deprivation of a constitutionally protected right. With respect to Sims' claims under the equal protection clause of the fourteenth amendment, the district court held that there was no deprivation of a constitutional right. In the case of the allegedly discriminatory application of the tardiness policy, the district court's determination that there was no violation of equal protection was made in the summary judgment. In the case of Mulcahy's entry of Sims' apartment, the determination that the right to equal protection of the laws was not violated was made as part of the jury's verdict following trial on the issue of liability.

In order to establish a *prima facie* case of discrimination violative of the equal protection clause, Sims was required to demonstrate that she was treated differently from other similarly situated employees. As we held in *McMillan v. Svetanoff*, 876 F.2d 186, 189 (7th Cir. 1989):

> "To establish a *prima facie* case [of racial discrimination under the fourteenth amendment] a plaintiff must show:
>
> > 'that he or she is a member of a protected class, that he or she is otherwise similarly situated to members of the unprotected class, and that he or she was treated differently from members of the unprotected class.' "

(Quoting *Collins v. State of Illinois*, 830 F.2d 692, 698 (7th Cir. 1987) that quoted, in turn, *Ramsey v. American*

Air Filter Co., 772 F.2d 1303, 1307 (7th Cir. 1985)). However, we have also explained that a discrimination plaintiff alleging a violation of the equal protection clause bears a heavier burden of proof than a discrimination plaintiff under Title VII:

> "Under Title VII, the petitioner must prove that she was discriminated against through disparate treatment based on an impermissible factor, or disparate impact of a neutral practice on a protected group. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 1824-26, 36 L.Ed.2d 668 (1973); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 & n.15, 97 S. Ct. 1843, 1854-55 & n.15, 52 L.Ed.2d 396 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-32, 91 S. Ct. 849, 853-54, 28 L.Ed.2d 158 (1971). In an Equal Protection claim, the petitioner faces the tougher standard of proving purposeful and intentional acts of discrimination based on her membership in a particular class not just on an individual basis. *See generally Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2049, 48 L.Ed.2d 597 (1976); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 563, 50 L.Ed.2d 450 (1977); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296, 60 L.Ed.2d 870 (1979)."

Forrester v. White, 846 F.2d 29, 32 (7th Cir. 1988) (per curiam). Thus, for Sims to demonstrate a *prima facie* case of racial discrimination under the equal protection clause, she must not only establish that she was treated differently, but she must also establish that the "*defendants acted with discriminatory intent.*" *Webb v. City of Chester*, 813 F.2d 824, 828 (7th Cir. 1987) (emphasis added). *Accord Volk v. Coler*, 845 F.2d 1422, 1430-31 (7th Cir. 1988). The requirement of a demonstration of intent based upon "membership in a particular class" described in *Forrester* is more than a decision maker's simple awareness of the consequences of his or her actions. As the Supreme Court

stated in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979):

> " 'Discriminatory Purpose,' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because,' not merely 'in spite of' its adverse affects upon an identifiable group."

(Citation and footnotes omitted). Examples of facts sufficient to demonstrate intent found in employment discrimination cases we have decided under the equal protection clause include allegations of a police commissioner's statement that "a woman has no business being a police officer," *Webb v. City of Chester*, 813 F.2d at 829, and statements that a defendant desired to "discourage women from applying for the position because he wanted to hire a man for that position," and that the plaintiff "need not apply for [the position] because they were going to hire a man for that position." *Van Houdnos v. Evans*, 807 F.2d 648, 652 (7th Cir. 1986).[8] If a *prima facie* case of racial discrimination under the Equal Protection Clause is established,

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[8] A *prima facie* case of an Equal Protection Clause violation under 42 U.S.C. § 1983 would also require a demonstration that the alleged deprivation was "under color of state law." In the case of municipal liability this would require a demonstration that the constitutional violation was "pursuant to official municipal policy of some nature." *Webb v. City of Chester*, 813 F.2d 824 (7th Cir. 1987). However, because Sims' case is decided upon the issue of whether she established a violation of the equal protection clause, it is unnecessary to determine whether she demonstrated that the City's actions were pursuant to a municipal policy. *See Mark v. Furay*, 769 F.2d 1266, 1271 (7th Cir. 1985) ("The question of whether a municipality *caused* a constitutional deprivation does not even arise absent proof that a deprivation in fact occurred.") (emphasis in original).

> "the burden then shifts to defendants to articulate a legitimate non-discriminatory reason for taking the action alleged by plaintiff to be discriminatory. If defendants do articulate such a reason, the burden then shifts back to plaintiff to demonstrate that the proffered reason is merely a pretext for discrimination."

Webb, 813 F.2d at 828.

a.

City Liability For Application Of The Alleged Discriminatory Tardiness Policy Under The Equal Protection Clause And 42 U.S.C. § 1983

The district court granted the City's motion for summary judgment determining that the City did not violate the equal protection clause in its application of its tardiness policy to Sims. "Summary judgment is properly entered in favor of a party when the opposing party is unable to make a showing sufficient to prove an essential element of a case on which the opposing party bears the burden of proof." *Common v. Williams*, 859 F.2d 467, 469 (7th Cir. 1988). As the Supreme Court noted: "In such a situation, there can be 'no genuine issue as to any material fact' since a complete failure of proof concerning an essential element of a non-moving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 417 U.S. 317, 322-23 (1986). In reviewing whether a non-party has established a required element of its case in a manner sufficient to avoid summary judgment, we remind party litigants that:

> "[A] party who bears the burden of proof on a particular issue may not rest on its pleading, but must affirmatively demonstrate, by specific factual allegations, that there is a *genuine* issue of material fact which requires trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106

> S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The party must do more than simply 'show there is some metaphysical doubt as the material facts.' *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (footnote omitted). 'Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." ' *Id.* at 587, 106 S. Ct. at 1356 (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288-89, 88 S. Ct. 1575, 1592, 20 L.Ed.2d 569 (1968))."

Beard v. Whitley County REMC, 840 F.2d 405, 410 (7th Cir. 1988) (emphasis in original).

In order to demonstrate a violation of the equal protection clause with respect to the City's application of its tardiness policy, Sims was required to demonstrate that she was treated differently from other similarly situated employees. As the district court determined, Sims had compiled *"a record of tardiness unrivaled by any of her co-workers."* *Sims v. City of Madison*, No. 88-C-524, Memorandum and Order on Summary Judgment at 17 (W.D. Wis. December 19, 1988) (emphasis added). In determining that Sims had failed to establish that the treatment she received was different than that received by similarly situated white employees, Benson in particular, the district court conducted an extensive review of Sims' attempts to compare her record to that of a white employee, Sharon Benson:

> "A review of the incidents of tardiness reveals that plaintiff had a record of tardiness unrivaled by any of her co-workers. Plaintiff principally relies upon the comparison of her record of discipline to that of Sharon Benson, a white employee. The Court does not find such a comparison to support differential discipline. The plaintiff's record of tardiness includes 15 incidents between April 1980 and June 1987. Sharon Benson's record indicates nine incidents during the same period.

> The plaintiff was tardy on seven occasions in 1980. She received a verbal reprimand after the fifth tardiness and a letter of reprimand after the seventh. Sharon Benson was tardy on six occasions in 1980 and 1981. She received a verbal reprimand after the second, third and fifth tardiness. The Court believes that the noted verbal reprimands received by Sharon Benson are, if anything, more severe than those received by Sheila Sims.
>
> In 1983 Sharon Benson was tardy on two occasions and received a written reprimand. She had only one other tardiness in February 1986 for three minutes, for which she was not reprimanded. In contrast to Benson's three incidents following the initial incidents in 1980 and 1981, the plaintiff's tardiness continued. In 1982 and 1984 plaintiff was tardy and received a verbal reprimand. In 1985 plaintiff was tardy four times and received one verbal and one written reprimand. In 1986, when plaintiff was tardy for the third time in six months, she received a one-day suspension, and in 1987 she was tardy and received a letter of reprimand.
>
> There is no question that the plaintiff received more discipline than other employees for her tardiness. There is also no question that her record for tardiness was not comparable to other employees. The discipline received by Sharon Benson seems entirely commensurate with her level of tardiness and does not demonstrate a more lenient treatment under the circumstances. Accordingly, the Court finds that the plaintiff has failed to establish a *prima facie* case of discriminatory discipline."

Id. at 17-18. We agree with the district court's analysis. Sims has failed to demonstrate that she was disciplined more severely than similarly situated white employees. Any differences between the discipline Sims received and the discipline other employees similarly situated received resulted from the differences in their respective tardiness

records. In light of these facts, we agree that a reasonable trier of fact could not have determined that Sims met her burden of demonstrating that she was treated differently from other similarly situated employees.[9]

Not only did Sims fail to demonstrate that she was treated differently than similarly situated white employees, she also fell far short of establishing the required element of discriminatory intent. The record appears devoid of any example of evidence revealing that Sims' race was considered in any manner in the City's discipline of Sims for her tardiness. The record certainly contains no examples of the types of express discriminatory statements or actions found sufficient to satisfy the element of discriminatory intent in our earlier decisions in *Webb* and *Van Houdnos*. Thus, because the allegations Sims presented were insufficient for a reasonable factfinder to conclude that she had established either the element of differential treatment or intentional discrimination required to demonstrate a *prima facie* case of racial discrimination under the equal protection clause, we conclude that the district court acted properly in determining that there was no deprivation of Sims' rights under the equal protection clause resulting from the City's application to Sims of its tardiness policies.

b.

City Liability For Mulcahy's Entry Of Sims' Residence Under The Equal Protection Clause And 42 U.S.C. § 1983

Following trial the jury rendered a verdict finding that Sims was not deprived of rights under the Equal Protection Clause as a result of Mulcahy's entry of her apart-

[9] We also agree with the district court's conclusion that Sharon Benson's health problems were a legitimate, non-discriminatory and non-pretextual basis for any differences in treatment that might have occurred in the cases of Sims and Benson.

ment. Specifically, the jury found that Sims was not "treated differently from non-minority persons by virtue of defendant Mulcahy's entry into her apartment on June 8, 1985." Sims has never challenged in the district court or on appeal the sufficiency of the evidence underlying the jury's verdict on this issue. Furthermore, the evidence in the record that Mulcahy was unfamiliar with Sims' employment record, including her tardiness, and entered Sims' residence only out of concern for her safety, health and possible injury when viewed in the light most favorable to Mulcahy, provides the "sufficient probative basis upon which a jury could reasonably reach a verdict"[10] that would be necessary to withstand any sufficiency of the evidence challenge. Thus, Sims has failed to establish a violation of federal equal protection clause rights resulting from Mulcahy's entry of Sims' apartment. Because demonstration of an equal protection clause violation in Mulcahy's entry of her apartment was an element essential to Sims' attempt to hold the City liable for an alleged Equal Protection Clause violation under 42 U.S.C. § 1983, the absence of any deprivation of equal protection of the laws is fatal to this claim.

2. CITY LIABILITY UNDER THE FOURTH AMENDMENT AND 42 U.S.C. § 1983

The jury found that Mulcahy had violated Sims' fourth amendment rights in his entry of her apartment. In order to hold the City of Madison liable for this constitutional violation, it was necessary for Sims to demonstrate that the constitutional deprivation was rooted in municipal policy or custom, in other words "caused by 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the City's] officers.' " *Patrick*, slip op. at 8 (quoting *Monell*, 436 U.S. at 690). As the Supreme Court has noted, "our first inquiry in any case alleging municipal liability under § 1983 is the

[10] *Anderson v. Gutschenritter*, 836 F.2d 346, 348 (7th Cir. 1988).

question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." *City of Canton v. Harris*, 109 S. Ct. 1197, 1203 (1989).

One basis for establishing the necessary causal link between municipal policy and the alleged constitutional deprivation would exist if the decision to enter Sims' apartment was a result of "a deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Zook v. Brown*, 865 F.2d 887, 895 (7th Cir. 1989). However, both Officer Mulcahy and Sergeant Gartner, the only individuals even arguably responsible for the constitutional violation, were both subordinate police officers who clearly were not invested with any final policy making authority dealing with the entry of Sims' apartment.[11] Thus, if municipal liability is to be legally established pursuant to case law, it must be grounded upon another basis.

The City could also be held liable for damages under *Monell* if Sims could demonstrate that the decision to enter her residence was made pursuant to official policy. But, the evidence establishes that the City's formal official policy with respect to the entry of employee residences was to require officers to conform to the limitations the Constitution places upon the entry of any private home and that there was not even an order given for Mulcahy to enter the apartment, much less a departmental practice to enter employee residences in similar circumstances. However, the non-existence of a formal policy does not preclude the existence of a custom or practice of unconstitutional entry of employee residences that could provide a basis for municipal liability. As we observed in *Gray v. Dane County*, 854 F.2d 179, 183 (7th Cir. 1988):

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[11] It should also be noted that Mulcahy was never ordered to enter Sims' residence.

> "This limitation on municipal liability has required the courts to determine whether particular actions by municipal employees, undertaken without formal authorization, can implicate the municipality by establishing the existence of an entrenched practice with the effective force of a formal policy. This court has held that 'the isolated, intentional acts of an officer [without authority to set municipal policy] do not establish municipal liability under section 1983,' *Rodgers* [*v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 202 (7th Cir. 1985)], and has repeatedly affirmed dismissals of section 1983 claims that seek to impose municipal liability based on such isolated acts. However, 'where the plaintiff alleges a pattern or a series of incidents of unconstitutional conduct, . . . the courts have found an allegation of policy sufficient to withstand a dismissal motion.' *Powe v. City of Chicago*, 664 F.2d 639, 650 (7th Cir. 1981) . . . ."

(Citations and footnotes omitted). This type of practice, although lacking formal approval, can provide a basis for municipal liability since

> "governmental customs, in contrast to official policies, do not receive 'formal approval through . . . [the local government's] official decision making channels,' *Monell v. Dept. of Social Services*, 436 U.S. at 690-691, 98 S. Ct. at 2036; rather, they are simply ' "persistent and widespread . . . practices of officials." ' *Id.* at 691, 98 S. Ct. at 2036. The word 'custom' generally implies a habitual practice or a course of action that characteristically is repeated under like circumstances."

Jones v. City of Chicago, 787 F.2d 200, 204 (7th Cir. 1986) (citation omitted).

Sims does not allege that there was a widespread practice of unauthorized and unconstitutional entry of employee residences capable of establishing a custom sufficient to support a conclusion of municipal liability. *See Gray*, 854 F.2d at 184 ("The offending officials clearly

were not conforming to informal practices ' "so permanent and well settled as to constitute a 'custom or usage' with the force of law." ' ") (Quoting *City of St. Louis v. Praprotnik*, 108 S. Ct. 915, 926 (1988) (plurality opinion) that quoted, in turn, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)). Rather, her position is that the City should be held liable because it failed to monitor its employees' entry into other employees' residences due to the absence of procedures for the notification of the police department when an employee entered another employee's residence and because it failed to properly investigate incidents where the entry of an employee's residence occurred. In *Jones v. City of Chicago*, 787 F.2d 200, 204-205 (7th Cir. 1986), we extensively considered the evidence necessary to demonstrate municipal liability on the basis of alleged inaction in response to unconstitutional misconduct on the part of the municipality's employees:

> "[I]naction in response to [the] misconduct of its employees may result in municipal liability but only where the injury is caused by 'faults "systemic in nature," ' *Strauss v. City of Chicago*, 760 F.2d 765, 770 (7th Cir. 1985), citing *Powe v. City of Chicago*, 664 F.2d 639, 651 (7th Cir. 1981); the isolated act of an employee generally is not sufficient to impose municipal liability. *See Monell v. Dept. of Social Services*, 436 U.S. at 694, 98 S. Ct. at 2037 (a municipality cannot be held liable solely because it employs a tortfeasor); *Cf. Pembauer v. City of Cincinnati*, ____ U.S. ____, ____, 106 S. Ct. 1292, 1293, 89 L.Ed.2d 452 (1986) ("Municipal liability may be imposed for a single decision by municipal policy makers under appropriate circumstances"); *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 284 (7th Cir. 1986) (single act of high-level policy maker can render local government liable under Section 1983). Further, in situations that call for procedures, rules or regulations, the failure to make policy itself may be actionable. *See, e.g., Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir. 1981); *Murray v. City of Chicago*, 634 F.2d 365,

366-67 (7th Cir. 1980) (failure of responsible officials to establish appropriate procedures for the prevention of serious malfunctions in the administration of justice implicates dereliction of duty of constitutional dimension for which municipality may be held liable under Section 1983), *cert. granted sub nom. Finlay v. Murray*, 454 U.S. 962, 102 S. Ct. 501, 70 L.Ed.2d 377, *cert. dismissed*, 456 U.S. 604, 102 S. Ct. 2226, 72 L.Ed.2d 366. We take [*City of Oklahoma City v. Tuttle*'s] 'affirmative link' requirement to mean that there must be some knowledge or an awareness—actual or imputed—of the custom and its consequences showing the municipality's approval, acquiescence or encouragement, or the alleged unconstitutional violation.

Further, the quantum of evidence needed is considerably greater where, as here, the particular customs that appellants claim resulted in their injuries involve a course of municipal inaction that is a good deal removed from the constitutional deprivation alleged. A plaintiff that faults a municipality's inaction must show that there is an 'extremely high degree' of municipal culpability. *Leonard v. Argento*, 699 F.2d 874, 885 (7th Cir. 1983), *cert. denied*, 464 U.S. 815, 104 S. Ct. 69, 78 L.Ed.2d 84; *cf. Strauss v. City of Chicago*, 760 F.2d at 769 (inaction that is 'significantly egregious' may render municipality liable for single injury under section 1983). As the district court stated below:

> 'No municipality may be held liable for its indifference to the mere *possibility* of a constitutional violation. Rather, the plaintiff must prove the municipality was aware either of actual deprivations or such a strong likelihood of imminent (though unrealized) deprivations that any reasonable person would have taken preventative measures.'

> *Jones v. City of Chicago*, 608 F. Supp. [994, 1000 (N.D. Ill. 1985)] (emphasis in original). Where the custom itself does not establish wrongdoing, there must be evidence of a course of events or circumstances that permit an inference of deliberate indifference or tacit authorization of the offensive acts. *See Leonard v. Argento*, 699 F.2d at 886."

(Citation omitted).

Turning first to Sims' claim that the City should be liable for its inaction in failing to require that it be notified after the fact of an employee's entry of another employee's residence, we have difficulty discerning "a course of events or circumstances that permit an inference of deliberate indifference or tacit authorization of the offensive acts." *Jones*, 787 F.2d at 205. As we noted in *Jones*, 787 F.2d at 205, a plaintiff must demonstrate that " 'the municipality was aware either of actual [constitutional] deprivations or of such a strong likelihood of imminent (though unrealized) deprivations that any reasonable person would have taken preventative measures.' " (Quoting *Jones v. City of Chicago*, 608 F. Supp. at 1000). There is nothing in this record even coming close to demonstrating a widespread custom or practice of entry into employee residences under similar circumstances of which the City was aware. Furthermore, the record fails to establish any facts from which it could be argued that there was "such a strong likelihood of imminent (though unrealized) deprivations that any reasonable person would have taken preventative measures." In light of this factual situation, we refuse to hold that the City's inaction with respect to the requirement of notification when an employee enters another employee's residence constituted the "deliberate indifference or tacit authorization of the offensive acts," *Jones*, 787 F.2d at 205, required for a holding of municipal liability based upon a city's inaction in response to its employees' misconduct.

Similarly tenuous is Sims' argument that municipal liability should arise because of the City's failure to con-

duct an adequate investigation of Officer Mulcahy's entry of her apartment. In fact, the record reveals that the City did make a satisfactory investigation of this incident through the efforts of Sergeant Sylvester Combs under the close supervision of Inspector Edward Daley. Inspector Daley even requested Combs to conduct follow-up interviews with Officer Mulcahy, Apartment Manager Paul Anderson, and two of Sims' fellow parking monitors following Combs' initial interview of Mulcahy. Although it is possible that the City could have conducted a more thorough investigation that would have included an interview with Sergeant Jerome Gartner, we are not of the opinion that a City investigation that included interviews with various relevant individuals over a three-month period constitutes the "deliberate indifference or tacit authorization of the offensive act,"[12] necessary to establish municipal liability based upon inaction in response to the misconduct of its employees.[13]

The absence of allegations sufficient to establish a "direct causal link between a municipal policy or custom, and the alleged constitutional deprivation," *City of Canton*, 109 S. Ct. at 1203, most clearly demonstrates that Sims has failed to present factual allegations "sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In light of this situation "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case

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[12] *Jones*, 787 F.2d at 205.

[13] Sims also alleges that the failure to order a satisfactory investigation of the entry of her apartment was racially discriminatory and the result of the City's failure to train its employees in facially neutral management techniques. This attack fails in light of Sims' inability to demonstrate how more thorough investigations of constitutional violations occurred in the cases of white employees who alleged constitutional deprivations at the hands of City officials.

necessarily renders all other facts immaterial," and the City "is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 323. Thus, we affirm the district court's grant of summary judgment in favor of the City of Madison, Wisconsin, on the issue of municipal liability for damages under 42 U.S.C. § 1983 resulting from Mulcahy's violation of the fourth amendment in entering Sims' residence.

IV.

MULCAHY'S CROSS-APPEAL ON THE QUALIFIED IMMUNITY ISSUE

Although the district court granted judgment wholly in favor of Mulcahy, dismissing Sims' complaint with prejudice, Mulcahy has cross-appealed from this favorable judgment. In *Byron v. Clay*, 867 F.2d 1049, 1050-51 (7th Cir. 1989), we explicitly held that a cross-appeal was improper and unnecessary in such circumstances. We observed:

> "The cross-appeal is improper. The district court's judgment is entirely in the defendant's favor, and you can't appeal from a judgment entirely in your favor. The defendants are simply advancing additional arguments in support of the judgment, and this they can do perfectly well in the answering brief. A cross-appeal is an *appeal* and therefore in order only when a party wants to change (even if only conditionally) the trial court's judgment. We repeat our admonition against the filing of unnecessary cross-appeals."

(Citations omitted, emphasis in original). We spoke even more emphatically on this issue in *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir. 1987):

> "The cross-appeal was unnecessary. A party may support a judgment in its favor with any argument preserved in the district court. Cross-appeals for the sole purpose of making an argument in support of

> the judgment are worse than unnecessary. They disrupt the briefing schedule, increasing from three to four the number of briefs, and they make the case less readily understandable to the judges. The arguments will be distributed over more papers, which also tend to be longer. Unless a party requests the alteration of the judgment in its favor, it should not file a notice of appeal."

(Citation omitted). *See also City of Milwaukee v. Yeutter*, 877 F.2d 540, 543 (7th Cir. 1989) ("Reminders, e.g., *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir. 1986), that prevailing parties need not file cross-appeals to make arguments in defense of their judgments seem to fall on deaf ears.").

Because we have affirmed the judgment rendered in favor of Mulcahy, it is unnecessary, and we refuse, to reach the issue of whether the district court should have dismissed the action against Mulcahy on the alternative ground of qualified immunity. We award costs to the defendants-appellees and request that they file a statement of costs for our perusal. The district court's judgment is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—5-9-90—500

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHEILA SIMS,

Plaintiff,

v.

JOHN MULCAHY,

Defendant.

ORDER

88-C-524-S

(Filed Feb. 17, 1989)

A jury trial was held in the above-entitled matter commencing January 3, 1989 and continuing through January 6, 1989. The jury found that defendant John Mulcahy violated the plaintiff's Fourth Amendment rights by entering her residence on June 8, 1985. In the damage phase of the trial the jury found none: neither compensatory nor punitive. Judgment was entered in favor of the defendant dismissing plaintiff's complaint with prejudice.

On January 17, 1989 plaintiff Sims moved for a new trial or in the alternative to amend the judgment for an award of nominal damages. On January 20, 1989 defendant Mulcahy moved for judgment notwithstanding the verdict or alternatively for a new trial. These motions will now be addressed.

Plaintiff's Motion

Plaintiff seeks a new trial on damages on the grounds that the jury's verdict is against the weight of the evidence, damages are inadequate and inconsistent with the

liability verdict, and prejudicial error was committed by the court concerning the jury's question and in its refusal to give the Damages – Community Humiliation and Loss of Reputation Instruction. She claims that the court's failure to give this instruction resulted in an inconsistent verdict where the jury found liability but not damages.

This instruction would have been given had there been introduced at trial evidence of plaintiff's community humiliation and loss of reputation according to *Webb v. City of Chester, Ill.*, 813 F.2d 824 (7th Cir. 1987). There was testimony at trial that plaintiff felt personally violated and humiliated but there was no evidence whatsoever that her reputation or good name were damaged by the defendant's entry into her home. Two instructions informed the jury that it could award damages for plaintiff's past and future pain, suffering and mental anguish. Had the jury found the testimony of plaintiff's witnesses credible, it could have awarded her damages for pain, humiliation and mental anguish suffered, which she had the opportunity to demonstrate, according to the instructions. The failure to give the community humiliation and loss of reputation instruction did not result in an inconsistent verdict. There simply was no evidence to support such an instruction.

Plaintiff seeks a new trial or in the alternative an amendment of the judgment claiming she is entitled to nominal damages for the deprivation of her constitutional rights as previously found by the jury in the liability phase of the trial. This is not the law stated by the court in *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978). Absent proof of actual injury a plaintiff cannot be awarded compensatory damages but may be awarded

nominal damages of up to one dollar. The award of nominal damages *may* be given for the violation of a constitutional right to vindicate absolute rights pursuant to the discretion of the fact finder. *See also Memphis Community School District v. Stachura,* 477 U.S. 299 (1986).

Plaintiff now objects to the instruction given to the jury concerning compensatory and nominal damages. This instruction is consistent with the holding in *Carey. See also Lenard v. Argento,* 699 F.2d 874 (7th Cir. 1983). Plaintiff's attorney readily approved this instruction as offered by the court even though her proposed instructions contained no language concerning the award of nominal damages. This instruction is consistent with the law and plaintiff waived her present right to object by not objecting before the jury was instructed.

After the jury began its deliberations, it submitted a written question to the court asking: "On question #1, is there a required minimum amount?" The court discussed the question with the attorneys and decided "no" was the correct answer. Plaintiff's counsel preferred to have a copy of the instruction, Compensatory and Nominal Damages, sent to the jury (the instruction to which she apparently now opposes). She did not, however, object to the court's answer which was consistent with the instruction. Plaintiff was not prejudiced by the response.

In addition to plaintiff's other arguments she contends that even though she was not awarded nominal damages she is the prevailing party according to *Ganey v. Edwards,* 759 F.2d 337 (5th Cir. 1985). This case was introduced by the defendant to support his position that nominal damages should not be awarded. An award of

nominal damages is not mandatory when a jury finds liability but no entitlement to compensatory damages. Further, a finding of liability for a constitutional violation need not be cause for compensatory damages in order to find that the plaintiff is the prevailing party for the purpose of awarding attorney fees. The holding in *Ganey* has been overruled by the United States Supreme Court in *Hewit v. Helms*, 107 S.Ct. 2672 (1987). In *Hewitt* the court held that to prevail a plaintiff must receive at least some relief on the merits of the claim. This relief could include monetary damages, declaratory or injunctive relief.

Plaintiff received no monetary relief. Although her complaint requested injunctive relief, no such injunctive or declaratory relief was pursued at trial or thereafter. Nor can any such relief be imagined from the circumstances of this case. According to *Hewitt*, plaintiff is not the prevailing party and is not entitled to attorney fees.

The court finds that the jury instructions were in accordance with the law. Plaintiff is not entitled to a new trial. The jury verdict is not against the clear weight of the evidence; there is no claim it was based on false evidence, and where substantial evidence is presented to the jury for the verdict rendered, a miscarriage of justice will not result from the court's entry of judgment thereon.

The plaintiff's motion to amend the judgment must also be denied. She is not entitled to nominal damages as a matter of law and is not the prevailing party.

Defendant's Motion

As aforesaid, the defendant John Mulcahy has filed a motion for judgment notwithstanding the verdict or alternatively for a new trial, even though he is the prevailing party. Apparently defendant does not wish to set aside the favorable verdict on damages but instead seeks to reargue his motion for directed verdict offered upon completion of the liability phase of trial. He claims that he is not liable for a violation of plaintiff's constitutional rights because the apartment manager had the apparent authority to consent to his search of plaintiff's apartment. This argument seems mooted by the judgment entered in defendant's favor but the court will briefly discuss its merits, understanding Officer Mulcahy's concerns.

Under the circumstances, as a matter of law, the defendant had no basis to rely on the apartment manager's lack of authority to search plaintiff's apartment either because of his position, the lease itself, or possession of the key. The cases upon which defendant continues to rely including *United States v. Cook*, 530 F.2d (7th Cir. 1976) *cert. denied*, 426 U.S. 909 (1976) refer to searches *of common areas*, not individual apartments, and are inapplicable to the circumstances before this court. Good faith is not an appropriate defense where as here the law is clearly established concerning searches allowed under the Fourth Amendment. *See Anderson v. Creighton*, 107 S.Ct. 3034 (1987). It was obvious to the court, and apparently to the jury as well, that neither the Constitution of the United States, nor police department policy, allows the constitutional violation in which defendant Mulcahy was engaged. It would be unusual, indeed, if we were to craft an exception to the Fourth Amendment allowing the

search of an employee's residence where that employee with a history of tardiness is 45 minutes late for work and where the apartment manager has a key and the right to enter only in certain emergency situations.

The standard for granting judgment notwithstanding the verdict has not been met. There is substantial evidence to support the verdict. The evidence presented, combined with all reasonable inferences that may be drawn from it is sufficient to support the liability verdict when viewed in the light most favorable to the plaintiff. Any conflict in the evidence must be resolved in plaintiff's favor and every permissible inference favoring that party must be drawn. When examining whether there is substantial evidence to support the liability verdict in viewing a motion for judgment notwithstanding the verdict the court does not judge the credibility of the witnesses, nor reweigh the evidence as does the jury to determine the preponderance of the evidence on either side. *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405 (7th Cir. 1984).

Defendant's motion for judgment notwithstanding the verdict must be denied because it is without merit and is further mooted by the jury's failure to award damages. The new trial standard has also been previously discussed and defendant does not qualify here either. His motion is moot, he is the prevailing party, and the liability verdict is not against the clear weight of the evidence.

ORDER

IT IS ORDERED that plaintiff's motion for a new trial or in the alternative to amend the judgment is DENIED.

IT IS FURTHER ORDERED that defendant's motion for judgment notwithstanding the verdict or alternatively for a new trial is DENIED.

Entered this 16th day of February, 1989.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

JUDGMENT IN A CIVIL CASE

(Filed Jan. 9, 1989)

UNITED STATES DISTRICT COURT

CASE TITLE
SHEILA SIMS
V.
JOHN MULCAHY, ET AL.

DISTRICT
WESTERN DISTRICT OF WISCONSIN

DOCKET NUMBER
88-C-524-S

NAME OF JUDGE OR MAGISTRATE
John C. Shabaz

X Jury Verdict. This action came before the Court and a jury with the judicial office named above presiding. The issues have been tried and the jury has rendered its verdict.

__ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is entered in favor of all defendants and against the plaintiff, dismissing the complaint of the plaintiff with prejudice.

Approved as to form this 6th day of January, 1989.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
U.S. District Judge

(Bifurcated Trial – Special Verdict Re: Liability)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHEILA SIMS,

Plaintiff,

v.

JOHN MULCAHY and
PAUL ANDERSON,

Defendants.

SPECIAL
VERDICT

88-C-524-S
(Filed
Jan. 4, 1989)

---

1. Did either of the following defendants deprive plaintiff of her Fourth Amendment rights by entering her apartment on June 8, 1985? (Answer yes or no)

John Mulcahy	Yes
Paul Anderson	No

2. Was plaintiff treated differently than non-minority persons by virtue of defendant Mulcahy's entry into her apartment on June 8, 1985?

ANSWER: No
(Yes or No)

IF YOU ANSWERED "YES" TO QUESTION 2, PROCEED TO QUESTION 3. OTHERWISE, PROCEED NO FURTHER.

3. Was plaintiff's race a substantial or motivating factor in causing defendant Mulcahy's entry into plaintiff's apartment on June 8, 1985?

ANSWER: _____
(Yes or No)

IF YOU ANSWERED "YES" TO QUESTION 3, PROCEED TO QUESTION 4. OTHERWISE, PROCEED NO FURTHER.

4. Would defendant Mulcahy have entered plaintiff's apartment on June 8, 1985 regardless of plaintiff's race?

ANSWER: _____
(Yes or No)

Signed this 4th day of January, 1989.

/s/ Emma Westphal
Foreperson

(Bifurcated Trial – Special Verdict Re: Damages)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHEILA SIMS,

Plaintiff,

v.

JOHN MULCAHY,

Defendant.

SPECIAL VERDICT

88-C-524-S

(Filed Jan. 6, 1989

---

1. What sum of money will fairly and reasonably compensate the plaintiff for any damage caused by defendant Mulcahy's unconstitutional entry into her apartment?

ANSWER: $ 0

2. Is plaintiff entitled to punitive damages?

ANSWER: No
(Yes or No)

(a) If so, in what amount?

ANSWER: $ _____

Signed this 6th day of January, 1989.

/s/ Emma Westphal
Foreperson

Exhibit 1:

Jury Question
(Jan. 6, 1989 2:30)

On question #1 is there a *required minimum amount*?

/s/ Emma Westphal
Foreperson

(Bench Conference on
Jan. 6, 1989 Regarding Jury's Question)

[p. 2] THE COURT: In the case of Sims against Mulcahy, counsel are present. Ms. Wagner, and Mr. Armstrong and Mr. Schooler for the defendants. The Court has this question from the jury.

On question one, is there a required minimum amount? Signed by [phonetic] Ms. Westfeld. Is there any objection to the Court answering no and returning it to the jurors? Ms. Wagner?

MS. WAGNER: I would prefer that the jury instruction that included the compensatory nominal instruction be sent with the answer no.

THE COURT: Mr. Armstrong?

MR. ARMSTRONG: I agree with the Court's suggestion of the answer no without any other information.

THE COURT: Well, I think that they do deserve to give the jurors a direct answer where the question is so easily answered and that is what I am going to answer. And question number one is there a required minimum amount? Members of the jury, no, in answer, in answer to your question.

* * *

Special Verdict/Jury Instruction
Conference: Regarding Damages

(Approximately 8:30-9:00 A.M. January 6, 1989)

* * *

[p. 3] THE COURT: Alright, I'll hear your comments concerns relating to the special verdict.

MS. WAGNER: I am uncomfortable with the single question because I think in this case, based on prior case law, there is several types of damages, in addition to the emotional distress and pain and suffering, there is also the community humiliation and loss of reputation and I had included with my proposed instructions information on Crawford versus Kraemer, at 719 Federal Second, 1370, 1983. It's a Wisconsin Jury Instruction that has been modified, number 2516. I think it's important for the jury to have a reasonable understanding of what types of components there are that they may be considering. I think this question tends to just lump it all as one area, and I feel that it may have the impact of short changing. But more critically, also of making it very difficult for them to deliberate it as to exactly what it is that they should be compensating for.

(Damage Instruction Sent To Jury
On Jan. 6, 1989)

DAMAGES – COMPENSATORY AND NOMINAL

The special verdict form that you will receive before you begin your deliberations inquires about damages.

You should determine what sum of money will fully compensate the plaintiff for any pain, suffering and mental anguish that was proximately caused by the defendant's violation of the plaintiff's rights. These damages are known as "compensatory damages." You are not permitted to award speculative damages. Do not include in any verdict compensation for any prospective loss which, although possible, is not reasonably certain to occur in the future.

Even if you find plaintiff is entitled to no compensatory damages, however, you may still award plaintiff nominal damages of up to one dollar for the violation of her constitutional right by any individual defendant.

Jury Instruction
Conference: Regarding Damages
(Approximately 11:00-11:30 a.m.,
January 6, 1989)

* * *

THE COURT: . . . [p. 4] It believes that in this particular instance there is a substantive constitutional violation, and that indeed, a buck, if you will on the vernacular, nominal damages just for that alone can be awarded. . . .

* * *

[p. 6] The instructions, then, will be as submitted except that the Court is of the opinion that – damages compensatory and nominal. I do think that there can be the suggestion as made by the defendant. That damage appears to be – defendant has referred in its instructions. I will place it only in one spot. I will not place it in approximate cause because of the cases which I have previously referred to. I will not place it in that portion which is determine to be the instruction more than approximate one approximate cause, but it does appear to be appropriate in the instruction entitled pain, mental anguish, past and future. The Court believes that that can, and I believe it has been, specified, in arriving in the amount of the award, you should include a sum which will compensate plaintiff reasonably for any pain, suffering, and mental anguish already suffered by her, and approximately resulting from the injury in question.

I would suppose we should change that to the action in question. I think there is a better word than injury. And any pain, suffering, and mental anguish that your find

from the evidence in the case which she is reasonably certain to suffer in the future from same cause.

[p. 7] I am at this time denying the defendant's that there should be no futures. There has been that testimony that she continues to have sleepless nights that she continues to feel some anxiety and anguish. I think it's a jury question, and accordingly, the only place that the mental anguish will be referred to as the Court can find will be in that damages instructions so entitled. It's already been there, and then we say [phonetic] Carry against Phifis. In this connection, you may take into account – strike that – that's the damages, pain and mental anguish. I am confusing myself with the damages compensatory and nominal. I believe that's the instruction. What I'm referring to mental anguish, I believe that that's the instruction to which I am referring.

You should determine what sum of money will fully compensate the plaintiff for pain, suffering, and mental anguish that was approximately caused by the defendant's violation of the plaintiff's rights.

I knew there was one instruction I want to change, and that's the one. That's the only evidence which has been before us. I am going to leave the one that I've just read to you as is except perhaps changing resulting from injury in question. Any further question at this time?

* * *

Special Verdict
Jury Instruction
Conference: Regarding Damages

(Approximately 8:30-9:00 a.m.,
January 6, 1989)

* * *

[p. 6] MS. WAGNER: No, your Honor. Oh, excuse me, yes there is. There is, as I indicated earlier, my instruction on page 34 that I would like to have included on the community humiliation and loss of reputation because I consider that a significant factor in this particular case as it relates to her damages.

* * *

Jury Instruction
Conference: Regarding Damages

(Approximately 11:00-11:30 a.m.,
January 6, 1989)

* * *

[p. 5] The next item relates to those instructions which were suggested by the plaintiff which the Court finds there is no – there is legal basis for the instruction which is entitled community humiliation and the loss of reputation. None of that has been presented. There is no question that the case which has been cited – I'll also give you another one which is a prior case, Bush against Burke, 648 Federal Second 509 which was cited in [phonetic] Crawford – community humiliation and loss of reputation are properly considered in determining compensatory damages 1983 claims. The Court did provide some attention to that. Believe that and believe that it is not appropriate. . . .

* * *

Plaintiff's Proposed Jury Instruction

DAMAGES – COMMUNITY HUMILIATION AND LOSS OF REPUTATION

With regard to community humiliation and loss of reputation, the measure of damages is such sum as will compensate the plaintiff for the damage that has resulted from (the illegal entrance into her residence, differential application of discipline, harassment in her working environment).

It is not required that the plaintiff prove damages by any financial yardstick measuring in dollars and cents. Injury to reputation, good name, and feelings are not subject to mathematical calculations or certainty. Further, it is not necessary for the plaintiff to prove that she suffered an actual out-of-pocket loss in order to substantiate damage to her reputation and good name.

Crawford v. Garnler, 719 F.2d 1317, 1324 (1983). Wisconsin Jury Instruction 2516 (as modified).

FILED
SEP 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-262

In The

Supreme Court of the United States

October Term, 1990

SHEILA SIMS,

Petitioner,

v.

JOHN MULCAHY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

I. WHETHER THE PETITIONER WAIVED, PURSUANT TO RULE 51, FEDERAL RULES OF CIVIL PROCEDURE, CONSIDERATION ON APPEAL OF THE JURY'S REFUSAL TO AWARD NOMINAL DAMAGES, BY FAILING TO REQUEST ANY JURY INSTRUCTION RELATING TO NOMINAL DAMAGES, BY AGREEING WITH THE DISTRICT COURT'S JURY INSTRUCTION RELATING TO NOMINAL DAMAGES, BY FAILING TO OBJECT AT TWO SEPARATE JURY INSTRUCTION CONFERENCES TO THE DISTRICT COURT'S PROPOSED NOMINAL DAMAGES JURY INSTRUCTION AND BY REQUESTING JURY INSTRUCTIONS ON MATTERS SO UNRELATED TO THE SUBJECT OF NOMINAL DAMAGES THAT THE DISTRICT COURT WAS NOT ON NOTICE THAT THE PETITIONER INTENDED TO CHALLENGE THE NOMINAL DAMAGES JURY INSTRUCTION.

PARTIES

Respondent agrees with the petitioner's statement of the parties involved in the present Petition for a Writ of Certiorari. The Petition does not list "all parties to the proceeding in the court whose judgment is sought to be reviewed," as required by Supreme Court Rule 14.1(b). Although the petitioner has failed to comply with Supreme Court Rule 12.4 requiring the petitioner to notify the Clerk in writing if one or more of the parties below has no interest in the outcome of the Petition, respondent agrees that, based on the questions presented in the Petition for a Writ of Certiorari, the other appellees below have no interest in the outcome of the Petition.

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No. 90-262

In The

Supreme Court of the United States

October Term, 1990

SHEILA SIMS,

Petitioner,

v.

JOHN MULCAHY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

Respondent is satisfied with the petitioner's statement of the opinions below.

JURISDICTION

Respondent is satisfied with the petitioner's statement of the grounds on which the jurisdiction of the United States Supreme Court is invoked.

STATUTES INVOLVED

In addition to the statutory provisions set forth in the Petition for a Writ of Certiorari, the following provisions are also involved in the questions presented:

Rule 46. Exceptions Unnecessary

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

Fed. R. Civ. p. 46

Rule 51. Instructions to Jury: Objection

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Fed. R. Civ. p. 51

STATEMENT OF THE CASE

The petitioner commenced an action against the City of Mad son, Wisconsin, and several of its police officials, including respondent, alleging that she was discriminated against on the basis of her race, that her Fourth Amendment rights had been violated and that the defendants' actions gave rise to a number of state law causes of action. The district court granted, in part, the defendants' motion for summary judgment and dismissed all of the plaintiff's state law claims and plaintiff's federal civil rights claims against all defendants with the exception of the respondent, City of Madison Police Officer John Mulcahy.

A bifurcated jury trial commenced on January 3, 1989. Following a two-day trial on the issue of liability, the jury found that the respondent's entry into the petitioner's apartment violated the petitioner's Fourth Amendment rights. The jury further found that the respondent's entry into the petitioner's apartment did not constitute differential treatment of petitioner based on her race. (Petitioner's Appendix, p. 51.)

The damages portion of the trial commenced on January 6, 1989. Immediately prior to the start of the damages trial, the district court held a conference with counsel for the parties concerning the special verdict and jury instructions relating to the issue of damages. (The January 6, 1989 pretrial special verdict and jury instruction conference transcript is reproduced in its entirety in Respondent's Appendix, pp. 1-11.) Counsel for the plaintiff was present at and participated in the special verdict

and jury instruction conference. The district court distributed a proposed special verdict and proposed jury instructions to the parties, and asked the attorneys for the parties for objections to the proposed instructions. Counsel for the petitioner expressed the following concerns relating to the district court's proposed jury instructions: (1) that the jury be alerted that evidence presented during the liability portion of the trial could be considered by the jury in its consideration of the damages verdict; and (2) that the court include an instruction on community humiliation and loss of reputation. (Res. App., pp. 4-5.) Petitioner expressed no other objection to the district court's proposed jury instructions.

The district court distributed at the special verdict and jury instruction conference a proposed instruction relating to compensatory and nominal damages which provided as follows:

> DAMAGES – COMPENSATORY AND NOMINAL
>
> The special verdict form that you will receive before you begin your deliberations inquires about damages.
>
> You should determine what sum of money will fully compensate the plaintiff for any pain, suffering and mental anguish that was proximately caused by the defendant's violation of the plaintiff's rights. These damages are known as "compensatory damages." You are not permitted to award speculative damages. Do not include in any verdict compensation for any prospective loss which, although possible, is not reasonably certain to occur in the future.
>
> Even if you find plaintiff is entitled to no compensatory damages, however, you may still

> award plaintiff nominal damages of up to one dollar for the violation of her constitutional right by any individual defendant.

(Pet. App., p. 56.) The petitioner did not object to this proposed instruction. Significantly, the jury instructions proposed by the petitioner contained no provision relating to an award of nominal damages. (Petitioner's proposed jury instructions are reproduced in Respondent's Appendix, pp. 12-18.)

The nominal damages jury instruction was specifically addressed by the court and counsel during the instruction conference. Counsel for petitioner stated, *"As it relates to the statements on the compensatory and nominal damages, I do not think that that statement as it is in there is inconsistent with the law."* (Res. App., p. 10.) The Petition for a Writ of Certiorari neglects to inform the Court of the petitioner's express agreement to the district court's proposed nominal damages instruction during the instruction conference. At the conclusion of the special verdict and jury instruction conference, petitioner was given the opportunity, but expressly declined, to assert any further objections to the district court's proposed jury instructions. (Res. App., p. 11.)

Following a half-day trial on damages, the district court held a second conference on jury instructions relating to the issue of damages. (A complete transcript of the January 6, 1989 post-trial special verdict and jury instructions conference is reproduced at pp. 19-25 of Respondent's Appendix.) The issue of the nominal damages jury instruction was again addressed by the district court at this conference. Petitioner made no request at this time for a jury instruction providing that nominal damages

must be awarded upon the finding of a constitutional violation. Moreover, the petitioner raised no objection at the second jury instruction conference to the district court's proposed nominal damages instruction, although again given an opportunity to do so. (Res. App., p. 24.)

During the jury's deliberations on the issue of damages, the jury asked the following question: "On question #1, is there a *required minimum amount*?" (Pet. App., p. 54.) The district court held a bench conference regarding the jury question and the district court judge asked the parties whether "there [was] any objection to the court answering no and returning it to jurors." (Pet. App., p. 54.) Counsel for petitioner did not object to this response, but stated, "I would prefer that the jury instruction that included the compensatory/nominal instruction be sent with the answer no." (Pet. App., p. 54.) The district court declined to include the jury instruction. The jury found that the petitioner was entitled to no damages and the district court consequently dismissed the petitioner's action.

The trial court denied the petitioner's post-verdict motions to amend the verdict to add one dollar and for a new trial on damages, finding that the plaintiff had waived this matter by failing to object to the jury instruction relating to nominal damages. On appeal, the Seventh Circuit Court of Appeals affirmed the district court's denial of the petitioner's motions to amend the verdict and for a new trial. The Seventh Circuit Court of Appeals found that the petitioner's failure to object to the nominal damages instruction, as required by Rule 51, Federal Rules of Civil Procedure, constituted a waiver of this issue on appeal.

SUMMARY OF ARGUMENT

The petitioner waived her right to appellate consideration of whether she is entitled to recover nominal damages. The petitioner did not object to the nominal damages instruction proposed by the district court. The petitioner expressly agreed with the district court's proposed nominal damages jury instruction. The petitioner requested no instruction of her own on the issue of nominal damages, and any objections by the petitioner to jury instructions relating to damages were not sufficiently specific to comply with Rule 51, Federal Rules of Civil Procedure. Moreover, the petitioner agreed with the district court's answer to a jury question during deliberations that the jury was not required to award a minimum amount of damages.

The Questions Presented in the Petition for a Writ of Certiorari do not accurately reflect the holdings of the court below. The Court of Appeals for the Seventh Circuit did not decide the issue of whether nominal damages must be awarded upon the finding of a constitutional violation because the Court of Appeals found that the petitioner had waived consideration of this issue by failing to object to the applicable jury instruction. Similarly, the Court of Appeals did not consider whether petitioner was entitled to a new trial based on allegedly inconsistent verdicts because the court found that the petitioner had waived any challenge to the damages verdict by petitioner's failure to object to the district court's proposed jury instructions. Moreover, petitioner waived consideration of this issue by the court of appeals by not raising this issue until her reply brief. Finally, the Seventh Circuit Court of Appeals did not find that Rules 46 and 51,

Federal Rules of Civil Procedure, should not be read conjunctively in determining whether a party has waived a challenge to a jury instruction, as petitioner asserts in her Petition. This issue was neither raised nor considered by the Seventh Circuit Court of Appeals. However, even had petitioner raised this issue, it would be meritless where petitioner failed to object with the degree of specificity required by Rule 46.

ARGUMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. PETITIONER HAS WAIVED APPELLATE CONSIDERATION OF WHETHER SHE IS ENTITLED TO RECOVER NOMINAL DAMAGES WHERE PETITIONER FAILED TO OBJECT TO THE JURY INSTRUCTION RELATING TO NOMINAL DAMAGES AS REQUIRED BY RULE 51.

Rule 51, Federal Rules of Civil Procedure, in relevant part, provides:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Fed. R. Civ. P. 51. The United States Supreme Court generally will not consider an issue where the petitioner fails to object to the applicable jury instruction. *Springfield v. Kibbe*, 480 U.S. 257, 107 S.Ct. 1114, 94 L. Ed. 2d 293 (1987). The well-recognized purpose of Rule 51's requirement that a party object to the district court's giving or failure to give an instruction, and specify the exact nature of the objection, as well as the grounds of the objection, is

to insure that the trial judge will become aware of the claimed error and will have an opportunity to correct it at trial. *Cohen v. Franchard Corp.*, 478 F.2d 115, 122 (2nd Cir.), *cert. denied*, 414 U.S. 857 (1973); *Don Kemper Co. v. Beneficial Standard Life Ins. Co.*, 425 F.2d 221, 222 (3rd Cir. 1970); *Ries v. Lynskey*, 452 F.2d 172, 174 (7th Cir. 1971); *Investment Service Co. v. Allied Equities Corp.*, 519 F.2d 508, 510 (9th Cir. 1975); *Hardware Mut. Ins. Co. v. Lukken*, 372 F.2d 8, 13 (10th Cir. 1967); Annotation, *Construction and Application of Provision of Rule 51 of Federal Rules of Civil Procedure Requiring Party Objecting to Instructions or Failure to Give Instructions to Jury, to State "Distinctly the Matter to Which He Objects and the Grounds for Objections"*, 35 A.L.R. Fed. 727 (1977).

Rule 51 also serves the purposes of both lessening the burden on appellate courts by decreasing the number of trial court rulings they may be called upon to review, and of avoiding the necessity of a new trial where a party, either by design or sheer neglect, fails to object to a proposed jury instruction. 9 C. Wright and A. Miller, *Federal Practice and Procedure*, §2551 (1971).

Federal Courts of Appeals have refused to review an alleged error in jury instructions where the complaining party did not request an instruction on the particular matter. *Walker v. Action Industries, Inc.*, 802 F.2d 703 (4th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *Worden v. Courtemanche*, 415 F.2d 349 (2nd Cir. 1969); *Gentry v. Louisville and Nashville Railroad Co.*, 371 F.2d 829 (6th Cir. 1967); *Lee v. Terminal Transport Co.*, 269 F.2d 97, 99 (7th Cir. 1959); *Mill Owners Mut. Fire Ins. Co. v. Kelly*, 141 F.2d 763, 766 (8th Cir. 1944).

In the present case, the petitioner submitted proposed jury instructions to the trial court on the question of damages, but said instructions included no provision whatsoever relating to nominal damages. During the two court hearings on the subject of jury instructions, the petitioner at no time orally requested a jury instruction relating to nominal damages. Moreover, the petitioner expressly concurred that the district court's proposed jury instruction relating to nominal damages accurately stated the law. Petitioner may not complain on appeal that the district court failed to properly instruct the jury on the issue of nominal damages where petitioner neither submitted nor requested an instruction relating to nominal damages.

It is settled law that an "objection to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer v. Hoffman*, 318 U.S. 109, 119, 63 S.Ct. 477, 87 L. Ed. 2d 645 (1943). Rule 51 expressly requires that a party state "distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51. The Courts of Appeals decisions are uniform that a party's failure to object to an instruction with particularity defeats the purpose of Rule 51 in that the district court does not have an opportunity to correct the alleged erroneous instruction and, thus, constitutes a waiver of consideration of the matter on appeal. *Chicago Col. of Ost. Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1349 (7th Cir. 1983); *Tropea v. Shell Oil Co.*, 307 F.2d 757, 769 (2nd Cir. 1962); *Jack v. Craighead Rice Milling Co.*, 167 F.2d 96, 103 (8th Cir.), *cert. denied*, 334 U.S. 829 (1948); *Krug v. Mutual Ben. Health & Accident Assn.*, 120 F.2d 296, 301 (8th Cir. 1941).

Petitioner at no time objected to the district court's proposed jury instruction on nominal damages with the required specificity to put the district court on notice that the petitioner was alleging error with regard to said instruction. At the first instruction conference, the petitioner requested an instruction to the effect that the jury could consider testimony from the liability portion of the trial when deliberating on the damages verdict and an instruction on loss of reputation and community humiliation. These requested instructions were wholly unrelated to the petitioner's assertion in her Petition that the district court should have instructed the jury that it must award nominal damages upon a finding of a constitutional violation. Petitioner's requested instructions were not adequately specific to allow the district court to "focus [on] the precise nature of the alleged error."

Petitioner did not simply fail to object to the proposed instruction on nominal damages; petitioner expressly stated that she believed the district court's proposed nominal damages instruction was in accord with the law in this area during a discussion specifically addressing the nominal damages jury instruction. ("As it relates to the statements on the compensatory and nominal damages, I do not think that that statement as it is in there [the court's proposed instruction] is inconsistent with the law.") (Res. App., p. 10.)

Petitioner's statement that she was uncomfortable with the court's proposed special verdict question on damages similarly lacks the requisite specificity to constitute a proper objection under Rule 51. Plaintiff's objection to the special verdict question asserted that a single question regarding compensatory damages may "short

change" the petitioner and may make it difficult for the jury to deliberate regarding "exactly what it is they should be compensating for." (Pet. App., p. 55.) This statement makes clear that petitioner's sole concern was with the issue of *compensatory* damages. This objection cannot reasonably be deemed to alert the district court that the petitioner was objecting to the nominal damages jury instruction.

Petitioner asserts that her response to the following question by the jurors during their deliberations further illustrates her objection to the district court's instruction on nominal damages: "On Question #1, is there a *required minimum amount*?". (Pet. App., p. 54.) The district court proposed the answer "no" to this question and the petitioner agreed with said answer, stating, "I would prefer that the jury instruction that included the compensatory/ nominal instruction be sent with the answer no." (Pet. App., p. 54.) The requested instruction, however, simply *allowed* the jury to award nominal damages, but did not require such an award. ("Even if you find plaintiff is entitled to no compensatory damages, however, you *may* still award plaintiff nominal damages of up to one dollar for the violation of her constitutional right by any individual defendant.") (Pet. App., p. 56.) Plaintiff's request that this instruction be sent to the jury could not reasonably have alerted the district court that the petitioner was asserting that an award of nominal damages was mandatory. Moreover, Rule 51 and case law thereunder provides that an objection made after the jury begins its deliberations is untimely and will not be considered on appeal. *Kanatser v. Chrysler Corp.*, 199 F.2d 610, 620 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953); *O'Connell v. Naess*,

176 F.2d 138, 140 (2nd Cir. 1949); *Feltman v. Norris*, 172 F.2d 289 (D.C. Cir. 1949). (See also, *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 486, 53 S.Ct. 252, 77 L. Ed. 439 (1933), stating the common-law rule that objections made to jury instructions after the jury has retired to begin its deliberations are untimely and do not furnish a basis for review.)

Petitioner's contention that she cannot waive a legal question must be rejected. Where the petitioner agreed that the district court's nominal damages instruction accurately stated the law in this area, said instruction became the "law of the case" which petitioner is precluded from challenging on appeal. *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir. 1988) (en banc). *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985).

This Court should deny the Petition for a Writ of Certiorari because the law is well-settled that failure by a party to timely object to a proposed jury instruction with specificity waives consideration of the matter involved in said instruction by an appellate court. Here, petitioner proposed no jury instruction of her own regarding nominal damages. Additionally, petitioner expressly approved the jury instruction relating to nominal damages which was proposed by the district court. Finally, any objections by the petitioner to the district court's proposed jury instructions were not sufficiently specific to alert the district court that petitioner objected to the nominal damages instruction. The district court and the Seventh Circuit Court of Appeals both correctly found that the petitioner waived her right, pursuant to Rule 51, to challenge the jury's refusal to award nominal damages.

II. THE QUESTIONS PRESENTED IN THE PETITION FOR REVIEW DO NOT ACCURATELY REPRESENT THE QUESTIONS DECIDED BELOW BY THE SEVENTH CIRCUIT COURT OF APPEALS.

The petitioner asserts that there is a split in the Federal Courts of Appeals on the issue of "whether nominal damages should be awarded as a matter of law when the jury in a bifurcated trial has found that there has been a constitutional deprivation under 42 U.S.C. Section 1983." (Petition for a Writ of Certiorari, p. i.) Petitioner is mistaken in her assertion that the Seventh Circuit Court of Appeals held that a jury is not required to award nominal damages upon the finding of a constitutional violation. The Seventh Circuit, in its decision below, never decided this issue because it found that the petitioner, by expressly agreeing to the proposed nominal damages jury instruction and failing to timely and adequately object to said instruction, as required by Rule 51, Federal Rules of Civil Procedure, had waived consideration of this issue on appeal. The Supreme Court should not utilize its limited time and resources to review an issue which the court below did not decide and which most of the Federal Courts of Appeals, to date, have not addressed.

Petitioner, in her Second Question Presented asserts that the Federal Courts of Appeals are in disagreement on the issue of whether Rule 49(a), Federal Rules of Civil Procedure, "requires that a party's motion for a new trial on damages be granted when there are inconsistent answers to special verdict interrogatories." (Petition for a Writ of Certiorari, p. i.) Significantly, petitioner did not raise before the Seventh Circuit Court of Appeals the question of her entitlement to a new trial due to allegedly

inconsistent verdicts until her reply brief. (Reply Brief of Plaintiff-Appellant and Answering Brief of Cross-Appellee, Section II.D.) It is well-settled law that issues which are raised for the first time in a reply brief are deemed waived. *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990); *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291, 1293 (7th Cir. 1987); *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 220 (7th Cir. 1986).

Finally, petitioner asserts that there is a split in the Federal Courts of Appeals on the issue of "whether courts are required to consider Rules 46 and 51 to be read conjunctively when determining that a party has waived any rights for a new trial." (Petition for a Writ of Certiorari, p. i.) Petitioner did not assert in either the district court or the Court of Appeals below that the courts must read Rules 46 and 51 conjunctively in determining whether the petitioner waived consideration of her entitlement to nominal damages. Consequently, this issue was not preserved for appellate review in the Supreme Court.

Assuming *arguendo* that Rules 46 and 51, Federal Rules of Civil Procedure, must be read conjunctively, Rule 46, like Rule 51, requires that a party state, with specificity, his or her objection to the court's ruling and the grounds for the objection. *Hernandez v. Hill Country Telephone Co-op, Inc.*, 849 F.2d 139, 142 (5th Cir. 1988); *Schultz v. Rice*, 809 F.2d 643, 646-47, n. 5 (10th Cir. 1986); *Bertrand v. Southern Pacific Co.*, 282 F.2d 569, 572 (9th Cir. 1960), *cert. denied*, 365 U.S. 816 (1961). ("Reading together Rules 46 and 51 as appellant asks us to do, it may be concluded that objections to the giving or the failure to give instructions need not follow any particular form.

Rule 46, however, does not undermine the provision of Rule 51 that whatever the form of the objection it must at least state distinctly the matter to which objection is taken and the grounds for the objection.") (Emphasis added) As discussed above, the petitioner failed to specify any objection to the district court's nominal damages instruction. Rule 46's abolition of the need to make formal exceptions to court rulings provides no relief to the petitioner.

At the close of petitioner's argument to the Third Question Presented, petitioner concedes that the language of the jury instruction relating to nominal damages was legally sufficient. ("There is nothing wrong with that language *per se*.") (Petition, p. 13.) Petitioner then asserts:

> The error of the trial court was as correctly pointed out by petitioner, the lumping together of all of the elements of damages for which petitioner was entitled to be compensated and utilizing the language "amount" and "compensated" for in conjunction with the *single* question that was to include nominal damages.

[Petition, pp. 13-14.] The Seventh Circuit Court of Appeals expressly refused to consider this argument because it had been raised by the petitioner for the first time in her reply brief. *Sims v. Mulcahy*, 902 F.2d 524, 536, n. 5 (7th Cir. 1990). Petitioner may not obtain review of this matter in the United States Supreme Court when she failed to comply with the rules of the Court of Appeals to obtain review of the issue in that court.

CONCLUSION

The United States Supreme Court should deny the Petition for a Writ of Certiorari because it is settled law that failure to timely and adequately object to a jury instruction constitutes a waiver of consideration of the particular matter on appeal. The Federal Courts of Appeals are in full accord on this matter and the facts of the present case present no novel issue of federal law. Petitioner did not simply fail to object to the district court's nominal damages instruction, she expressly stated to the district court that the court's proposed instruction was consistent with the law. Such conduct clearly establishes a waiver of any objection to the jury instruction on appeal.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHEILA SIMS,	)	
	)	
Plaintiff,	)	Case No. 88-C-
vs.	)	524-S
	)	
CITY OF MADISON,	)	Filed Jan 30
Defendant.	)	1989

CONFERENCE RE: SPECIAL VERDICT AND JURY INSTRUCTIONS
CONCERNING DAMAGES

BEFORE DISTRICT JUDGE JOHN C. SHABAZ

Conference on January 6, 1989

APPEARANCES:

For the Plaintiff: Kathleen Wagner
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For the Defendant: Steven J. Schooler
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Karen Little, Transcriber
Words Unlimited

(p. 2) THE CLERK: All rise. All persons having business before the Honorable Judge John C. Shabaz of

the United States District Court of the Western District of Wisconsin will draw nigh and get their attention. This Honorable Court is now in session. God save the government of the United States and this Honorable Court. Please be seated and come to order.

Case number 88 C 524 S, Sims versus City of Madison, called for a conference. May I have your appearances please?

MS. WAGNER: Yes, Sheila Sims appears by her attorney Kathleen A. Wagner, Wagner Law Offices, S.C.

MR. ARMSTRONG: The defendant John Mulcahy appears by attorney Brad Armstrong, presently Mike Model and Steven Schooler will be here shortly.

THE COURT: The Court has distributed – has caused to have distributed to counsel a proposed special verdict and those jury instructions which are suggested as appropriate in this matter. Ms. Wagner, have you had an opportunity to examine them?

MS. WAGNER: I have had an opportunity to look at the special verdict. I have not had an opportunity to look at the instructions, yet, your Honor.

(p. 3) THE COURT: Alright, why don't we take a few moments, then, to examine the documents so we can have our conference.

[Examining Documents]

THE COURT: Ms. Wagner?

MS. WAGNER: Yes, I've had an opportunity to review them.

THE COURT: Alright, I'll hear your comments concerns relating to the special verdict.

MS. WAGNER: I am uncomfortable with the single question because I think in this case, based on prior case law, there is several types of damages, in addition to the emotional distress and pain and suffering, there is also the community humiliation and loss of reputation and I had included with my proposed instructions information on Crawford versus Kraemer, at 719 Federal Second, 1370, 1983. It's a Wisconsin Jury Instruction that has been modified, number 2516. I think it's important for the jury to have a reasonable understanding of what types of components there are that they may be considering. I think this question tends to just lump it all as one area, and I feel that it may have the impact of short changing. But more critically, also of making it very difficult for them to deliberate it as to exactly what it is that they should be compensating for.

(p. 4) THE COURT: Further?

MS. WAGNER: As it relates to the punitives, it is very brief, but I think it's to the point, and it's acceptable from our perspective, your Honor.

THE COURT: Mr. Armstrong.

MR. ARMSTRONG: I – with respect to question one, I would object and ask that the word damages be deleted and the words suffering and mental anguish be inserted, focusing on what I believe the evidence will show to be the only damages, or type of damages sustained in this case, contrary to the types of damages

suggested in plaintiff's requested special verdict. Secondly, I object to any inclusion of a question regarding punitive damages, for the court has heard, I believe perhaps all evidence relating to the – surrounding the nature of the entry into the apartment. In the case of Smith versus Wade, the law is that the jury can assess punitive damages. In the 1983 action where the defendants conduct is motivated by evil motive or intent in where it involves reckless or callous indifference to the federally protected rights of others.

THE COURT: I'm not interested in the motion for directed verdict on the evidence at this time. We haven't completed the damage portion of the trial. Your arguments may very well be appropriate, but they are premature at this time. The Court at this time is placing before you a (p. 5) special verdict based upon those issues which may be appropriately submitted to the jury. We are looking at the form.

MR. ARMSTRONG: In the event that the Court, over objection, determines that a punitive damage question is appropriate, number two is appropriate.

THE COURT: Alright, we'll then next look at the instructions which the Court has provided out here, those concerns of the plaintiff relating to the instructions. Ms. Wagner?

MS. WAGNER: Yes, your Honor, one of my concerns, and I'm not sure of where the exact location should be in the instructions. Perhaps as we talk about the preponderance of the evidence, is the fact that this is a bifurcated trial, and therefore would like to call the jury's attention to the fact that they don't only consider the

evidence as it is presented today, but also the evidence as it was presented earlier in the week. I consider that particularly significant as it relates to the punitive damages question because I think the fact that there was no attempt to call the supervisor after it had happened, or the identification weeks as to who had entered Ms. Sims' apartment, is the type of information that the jury needs to deliberate with in answering question number (p. 6) two, and I would prefer not having to – not present that evidence today and take up the Court's time.

THE COURT: You won't even be allowed to. If you try it, you'll be ruled out of order. So, don't be concerned about that. In fact, maybe that's one way of getting it to the jury. Once you start on that course, the Court will admonish you in front of the jury and advise that the jury does, indeed, consider all of the evidence as presented in both phases of this trial in reaching its verdict on damages. That's understood.

MS. WAGNER: Maybe to us. I'm not sure as to a juror.

THE COURT: Well, tell them then. Tell them in your argument, if you want to. Anything further on the instructions?

MS. WAGNER: No, your Honor. Oh, excuse me, yes there is. There is, as I indicated earlier, my instruction on page 34 that I would like to have included on the community humiliation and loss of reputation because I consider that a significant factor in this particular case as it relates to her damages.

THE COURT: There will also be the final instructions, which you recall, from the first phase of the trial relating to the anonymous verdict, and those other appropriate instructions which are included in your (p. 7) previous package of the last four instructions. The Court uses those last four instructions which may be appropriate. Mr. Armstrong?

MR. ARMSTRONG: Yes, sir, regarding the instructions, we have no objection to the . . .

THE COURT: I want the objections that you may have.

MR. ARMSTRONG: Yes, sir. In regard to approximate cause defined, in more than one approximate cause, we would request that our instruction be given. It is only a deviation from the Court's proposed instruction in that we focus on what I believe the claim damage will be, suffering and mental anguish, and delete the words injury or damage.

THE COURT: Now, let's see if I am tracking you now.

MR. ARMSTRONG: Yes, sir.

THE COURT: You are suggesting that instead of the approximate cause defined, add more than one approximate cause, you have the court insert the deleted instruction which was filed at 8:29 this morning.

MR. ARMSTRONG: No, that's not what I'm asking. I want that . . .

THE COURT: Why don't you speak English and let me know what you are talking about? We got instructions

(p. 8) here. I'll count them for you. Can you count? Alright, then let's proceed to those instructions which you object to.

MR. ARMSTRONG: Approximate cause defined.

THE COURT: Alright. You're objecting to that.

MR. ARMSTRONG: Yes.

THE COURT: And you wish to have instead of that what?

MR. ARMSTRONG: The language that I have requested in my proposed instructions whereby the words injury or damage are deleted, and words suffering or mental anguish are inserted at each place those words appear.

THE COURT: Alright. That's that instruction. That was the same arguments that you made as it related to the special verdict. Next.

MR. ARMSTRONG: More than one approximate cause instruction, I object to that from the same basis. I want the words suffering or mental anguish inserted, and the words injury or damage deleted.

THE COURT: Next.

MR. ARMSTRONG: Instruction entitled damages, compensatory and nominal. I object to the last sentence of the second paragraph which talks about damages reasonably certain to occur to the future. I don't believe there will be any appropriate competent proof, medical and otherwise, (p. 9) to support a claim for any future damages. I object to that same instruction to the last

paragraph. My judgment being that it is contrary to the law and I have requested this morning an instruction regarding damages. I do not believe that jury is entitled to award nominal damages for the violation of the constitutional right in the absence of proof of an actual injury.

THE COURT: And you also believe, if I understand you, the last sentence of the second paragraph of that instruction entitled damages compensatory and nominal which reads do not include in any verdict compensation for any prospective loss which although possible, is not reasonably certain to occur in the future. Is that the sentence you want stricken?

MR. ARMSTRONG: Yes, sir.

THE COURT: Alright. Further.

MR. ARMSTRONG: I object to the instruction entitled damages, pain, mental anguish, past and future. I object to number two within the first paragraph in its entirety in that it refers to damages for future damages for the cause. It is the same objection that we just discuss regarding the last instruction discussed. So, from the semicolon the words and paran two any pain suffering and mental anguish which you find from the evidence in the case that she is reasonably certain to suffer in the future (p. 10) from the same cause, I object to it and ask that it be deleted.

THE COURT: Further

MR. ARMSTRONG: I object to the instruction entitled punitive damages, constitutional violation in its entirety in that I do not believe that the evidence will support the giving of such an instruction. I do not object

to the wording of the instruction, should the Court deem it appropriate to give the instruction.

THE COURT: Further.

MR. ARMSTRONG: I object to the instruction entitled affect of instructions as to damages. I object to the entire last sentence and ask that it be deleted in that I believe it suggests to the jury contrary to this instruction I requested this morning, that in the event of a finding in favor of plaintiff on the question of liability, their entitled and should award damages. I believe that's not the law.

THE COURT: Anything further?

MR. ARMSTRONG: I request that my instruction provided the Court and counsel this morning entitled damages, . . . of actual injury, be given as in its entirety as indicated and as submitted.

(p. 11) THE COURT: You also have heard the requested additional instructions from plaintiff's counsel, your comments relating to that.

MR. ARMSTRONG: Yes. I object to the giving of instruction which she is entitled, number 7, damages, community humiliation, and loss of reputation on the grounds that it is not and will not be consistent with the theory of the case of the proof in the case. The support for the claims are a [phonetic] a Crawford versus Garnier case, which is a termination of employment case. The public employer terminated some employee and in so doing, there was actual proof of words in consistent with the employee's reputation which did not allow him to obtain further employment. In other words, there was actual proof of damaged reputation. That was the theory

of the case. And the Wisconsin Jury Instruction cited as support for giving this instruction is one preceding of the claim for defamation, and this not a case a state claim for defamation and there will not be appropriate evidence regarding reputation in this case, and is not to date.

THE COURT: Your response, Ms. Wagner?

MS. WAGNER: As it relates to the instructions of approximate cause, that is approximate cause defined in the more than one approximate cause, I believe the instructions as given by the Court are the appropriate instructions and (p. 12) they are consistent with the standard instructions given. As it relates to the statements on the compensatory and nominal damages, I do not think that that statement as it is in there is inconsistent with the law. It simply indicates that the jury is entitled to award nominal damages. It doesn't say that there isn't any injury. It simply states that even if there are not compensatory damages [unclear] . . .

THE COURT: It's required under Cury against Pfitez [unclear] . . . reversible error to not to give it, so, you don't have to address yourself to the shotgun technique which has been used here, just the substantive ones. [two voices talking at once]

MS. WAGNER: As I would like to approach that on the pain and suffering, I think that the instruction from the Court again is the standard appropriate one. I think it is for the jury to determine what the future impact is on the plaintiff. I think the evidence is there for punitive, and I object to his statement, all because I think it confuses the jury as it relates to actual injury inferring that there there isn't any injury and I think it could be very

misleading as it – it is – it comes across, because it may infer that it may be a physical injury, and I don't that's the case.

(p. 13) THE COURT: Alright. Many of the arguments offered by the defendant may very well, not many, some may have some further consideration by the Court. The defendant's suggestions are assuming that certain evidence will not be presented. And in the event that does occur, there will be the appropriate excising. The Court, however, does attempt to provide counsel with all of those appropriate instructions which may be provided to a jury dependent upon that proof which may be offered, and accordingly, the Court will reserve on those objections based upon that evidence which is submitted to the jury when we begin.

Is there anything further to come before the Court before we ask the jury to join us? Ms. Wagner?

MS. WAGNER: No, your Honor.

THE COURT: Alright. We will recess for approximately three minutes and we will see if all the jurors are here and if they are, we will begin about two minutes after nine.

PLAINTIFF'S REQUESTED SPECIAL JURY INSTRUCTIONS – DAMAGES

COMPENSATORY DAMAGES: VIOLATION OF CONSTITUTIONAL RIGHTS

You, the jury, have already found that the defendant(s) – The City of Madison, Thomas Hischke, Robert Peterson, Jerome Gartner, Robert Birrenkott, John Mulcahy and Paul Anderson – have violated the Constitutional rights of the plaintiff, Sheila Sims. Specifically, you have found: (Court reads violation of specific rights.) Damages for a violation of the plaintiff's constitutional rights fall into two categories: Compensatory and Punitive damages. You should first assess the amount of compensatory damages that would fairly and reasonably compensate the plaintiff for this violation of her rights.

Sheila Sims may recover compensatory damages for lost wages, loss of future earning capacity, mental and emotional distress, community humiliation and loss of professional reputation caused by the infringement of her constitutionally protected rights of free speech and association.

In assessing compensatory damages, you should award the plaintiff only those damages which will reasonably compensate her for the injuries that she sustained as a result of the illegal (entrance into her residence, differential treatment in the manner that discipline was progressed against her, harrassment in her working environment.)

After assessing plaintiff's compensatory damages, you will then be asked to assess what amount of punitive damages, if any, should be awarded against the individual defendant(s).[1]

* * *

5. DAMAGES – LOST WAGES

In arriving at the amount of an award for lost wages, you should include the reasonable value of the time, if any, shown by the evidence in the case to have been necessarily lost up to date by the plaintiff, Sheila Sims, since June 8, 1982, as a result of the differential application of discipline against her. In determining this amount, you should consider any evidence of plaintiff's earning capacity, her earnings, and the manner in which she ordinarily occupied her time before the injury, and find what she was reasonably certain to have earned during the time so lost, had she not been the subject of the differential application of discipline.[2]

6. DAMAGES – MENTAL AND EMOTIONAL DISTRESS

In arriving at the amount(s) of the award(s) for mental and emotional distress, you should include a sum

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[1] *Knapp v. Whitaker*, 757 F.2d 827, 847 (7th Cir. 1985) (citing *Soldis v. Rio Grande City Independent School District*, 734 F.2d 243, 250-251 (5th Cir., 1984) and *McGee v. South Pemiscot School District*, 712 F.2d 339, 344 (8th Cir., 1983).

[2] §85.04, at 197-198, *Sims*, Federal Jury Practice and Instructions (Devitt & Blackmar; 3d. ed. 1977, Substantially Modified).

which will compensate plaintiff reasonably for (1) any pain, suffering and mental anguish already suffered by her and proximately resulting form the injury in question; and (2) for any pain, suffering and mental anguish, which you find from the evidence in the case that she is reasonably certain to suffer in the future from the same cause.

In this connection you may take into account, and you should take into account, plaintiff's interests and past way of life and you may allow for any loss of enjoyment of life for any emotional strain or any mental suffering which you find proximately resulted from the actions of the defendant(s).[3]

7. DAMAGES – COMMUNITY HUMILIATION AND LOSS OF REPUTATION

With regard to community humiliation and loss of reputation, the measure of damages is such sum as will compensate the plaintiff for the damage that has resulted from (the illegal entrance into her residence, differential application of discipline, harassment in her working environment).

It is not required that the plaintiff prove damages by any financial yardstick measuring in dollars and cents. Injury to reputation, good name, and feelings are not subject to mathematical calculations or certainty. Further, it is not necessary for the plaintiff to prove that she

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[3] § 85.05, at 115, *Sims*, Federal Jury Practice and Instructions (Devitt & Blackmar; 3d. ed. 1977). *Wells v. Colorado College*, 478 F.2d 158, 163 (10th Cir. 1973).

suffered an actual out-of-pocket loss in order to substantiate damage to her reputation and good name.[4]

8. DAMAGES – PUNITIVE

In addition to actual or compensatory damages, the law permits you, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for their conduct, and to serve as an example or warning to others not to engage in such conduct.

If you should find from a preponderance of the evidence in this case that the plaintiff, Sheila Sims, is entitled to a verdict for actual or compensatory damages and should further find that the conduct of the defendant(s) (specify) which proximately caused the damage to Sheila Sims was malicious, wanton or oppressively done; then you may, if in the exercise of your discretion, you unanimously choose to do so, add to the award of actual or compensatory damages such amount as you shall agree will serve to punish defendant(s) and to deter the defendant(s) and others from like conduct.

An act or a failure to act is "maliciously" done if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories to which the injured person is a member.

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[4] *Crawford v. Garnier*, 719 F.2d 1317, 1324 (1983). Wisconsin Jury Instruction 2516 (as modified).

An act or a failure to act is "wantonly" done if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or failure to act is "oppressively" done if done in a manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse of abuse of authority or power, or by taking advantage of some weakness, disability, or misfortune of another person.

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the defendant(s)' acts or omissions, which proximately caused actual damage to the plaintiff, were maliciously or wantonly or oppressively done; and the jury should also bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reasons, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.[5]

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[5] § 85.11, at 120-22, *Sims*, Federal Jury Practice and Instructions (Devitt & Blackmar; 3d. ed. 1977); *Smith v. Wade*, ___ U.S. ___, 103 S.Ct. 1625, 75 L.Ed.2d 632, 664, n. 15 (1983); *Crawford v. Garnier*, 719 F.2d 1317 (7th Cir. 1983).

9. DAMAGES: TAXATION

In determining the amount of damages for past income and punitive damages you may include in the award a sum to compensate the plaintiff, Sheila Sims, for state or federal income taxes, since damages received as an award for past income and punitive damages are subject to income taxes.

In determining the amount of damages for humiliation, embarrassment, worry, emotional and mental distress, you must not include in the award, or add to it, any sum to compensate the plaintiff for state or federal income taxes, since damages received as an award for humiliation, embarrassment, worry, emotional and mental distress are not subject to income taxes. You will not, of course, subtract from or exclude from you award of damages, any amount because the plaintiff is not required to pay income taxes.[6]

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[6] Support: Instruction and evidence as to the impact of income taxes is appropriate in cases determined pursuant to federal substantive law. *Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980); *In Re Air Crash Disaster Near Chicago, Illinois*, 701 F.2d 1189, 1192 (7th Cir., 1983). Damages which represent compensation for loss of future income, pension and disability benefits, other fringe benefits, and loss of professional reputation, are included as income for federal and state taxes. *Knuckles v. Commissioner*, 349 F.2d 610 (10th Cir. 1965); *W.F. Henry*, 62 Tax Ct. Rep. (C605 (Decision No. 5585-73 (1974)); *W.H. Evans*, 40 Tax Ct. Memo Dec. 260 (Decision No. 2623-78, T.C. Memo 1980-142 (1980)). *V.L. Anderson*, 38 Tax Ct. Memo Dec. 1206 (decision No. 7586-77, T.C. Memo 1979-303 (1979)); *F. Gunderson*, 38 Tax Ct. Memo Dec. 464 (Dec. 7922-77, T.C. Memo 1979-99 (1979)).

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Revenue Ruling 84-103, 1984-2 C.B. 32 (punitive damages not excludable from gross income); Revenue Ruling 85-98 I.R.B. 1985-2, 5 (amount received in settlement which is attributable to punitive damages is taxable); damages which are compensation for personal injuries are not taxes. ¶ 104(a)(2) of the Internal Revenue Code of 1954, 26 U.S.C. § 104,(a)(2).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHEILA SIMS,	)	
	)	Case No.
Plaintiff,	)	88 C 524 S
vs.	)	
	)	Filed
CITY OF MADISON,	)	JAN 30 1989
Defendant.	)	

CONFERENCE RE: SPECIAL VERDICT AND JURY INSTRUCTIONS CONCERNING DAMAGES, part 2

BEFORE DISTRICT JUDGE JOHN C. SHABAZ

Conference on January 6, 1989

APPEARANCES:

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Karen Little, Transcriber
Words Unlimited

(p. 2) THE COURT: . . . I'm now going to address, and the problem is that it may take a few moments more than 11:30. I am now going to address your attention to the instructions and the special verdict.

First of all, the special verdict will read as follows: One change. Question one. What sum of money will thoroughly and reasonably compensate the plaintiff for any damage caused by. I'm deleting the and I'm singularizing damage – caused by defendant Mulcahy's unconstitutional entry into her apartment. I am accepting the specific rather than the general language. That specific language having brought to our attention by Mr. Schooler in the liability portion of the trial. To be consistent, I would be using that specific language. The rest of the verdict is the same.

I wish to display the Court's surprise as it relates to the damages requirement of actual injury. This was presented to the Court by the same firm that represented someone by the name Morzenti and a case a number of years ago called Morzenti against Iron County. I believe Mr. Schooler was part of that plaintiff's successful case and argued very vociferously against this type of an instruction, but Mr. Schooler – and I've checked my notes, if I can find it, I just thought I'd spend some time on this to indicate the Court's concern with the changes in (p. 3) positions which appear to occur by good counsel in matters of this nature for which there is apparently no basis whatsoever to make those changes in a case of this nature.

The trial in that case, the plaintiff – this was a pretrial – the case was tried on September 12 of 1983 – Now, Mr.

Schooler and Mr. Mitby were the attorney's for the plaintiff against Iron County. The question on that special verdict which was forcefully argued by the plaintiff was what sum of money will compensate plaintiff for any damage approximately caused by the defendants. We then did specifically itemize certain items such as emotional distress. It's the Court's recollection at that time that there was presented to the Court the arguments in Leonard against Argento, 699 Federal Second 874, 1983 decision, and I'd like you to review it at 889 where it talks about Cury against Pfifetz which tells us that for a violation of a constitutional right itself, there may be damage. The was the request that the Court itemize that specific category constitutional damage. The Court declined to do that. The Court doesn't believe that can be done, although there are some Courts that do, and you'll find that reexamination of that.

I'm doing most of this from memory, but the fact is that in those early days, it seemed that everybody had a pretty good idea of what was going on, and every time that (p. 4) I see these changes, I just wonder, you know, what's really happened in this area of the law which changing. I don't find anything which allows the [phonetic] Memphis . . . Sticora Instruction. This case is for compensatory damages only where they may be awarded for actual damage. That isn't the case here.

The case here, as significantly argued by counsel on previous occasions, the very violation of a constitutional right itself is something that this jury may consider. And that's the reason. Ever since that case, the Court does craft the instruction which – the Court believes which very well have been appropriate in that case, you'll also

find that we gave the good faith instruction, when you look at it Mr. Schooler. We had been wrong on that point, but nobody knew it, I guess. But the fact of the matter is – or perhaps that was before they told us in [phonetic] Travels and Bates against Jean that we can't do that – but the fact is that the Court rejects – this is a long way of telling it – rejects your supplemental instruction.

It believes that in this particular instance there is a substantive constitutional violation, and that indeed, a buck, if you will on the vernacular, nominal damages just for that alone can be awarded. And I realize that I'll be stating this perhaps each and every instruction conference (p. 5) with this firm and one or two others for the balance of this Court's career.

Accordingly, that instruction is rejected.

The next item relates to those instructions which were suggested by the plaintiff which the Court finds there is no – there is legal basis for the instruction which is entitled community humiliation and the loss of reputation. None of that has been presented. There is no question that the case which has been cited – I'll also give you another one which is a prior case, Bush against Burke, 648 Federal Second 509 which was cited in [phonetic] Crawford – community humiliation and loss of reputation are properly considered in determining compensatory damages 1983 claims. The Court did provide some attention to that. Believe that and believe that it is not appropriate. Nor is the monetary loss appropriate if there is that attempt to be found as to the loss of rent. There was no attempt to rent the plaintiff's decision was that she would not rent. That was her personal decision. She determined

that to be the best way to proceed. There was no basis whatsoever to indicate that the other bedroom could not have been rented. Nor do I believe there was anything in the record to indicate she had previously received rent from the roommate with whom she had been residing at the time of this action. That, of course, is not relevant to the Court's decision, (p. 6) but there has been no determination that there was an attempt to rent. There has been no determination that someone refused to rent because of the incident.

The instructions, then, will be as submitted except that the Court is of the opinion that – damages compensatory and nominal. I do think that there can be the suggestion as made by the defendant. That damage appears to be – defendant has referred in its instructions. I will place it only in one spot. I will not place it in approximate cause because of the cases which I have previously referred to. I will not place it in that portion which is determine to be the instruction more than approximate one approximate cause, but it does appear to be appropriate in the instruction entitled pain, mental anguish, past and future. The Court believes that that can, and I believe it has been, specified, in arriving in the amount of the award, you should include a sum which will compensate plaintiff reasonably for any pain, suffering, and mental anguish already suffered by her, and approximately resulting from the injury in question.

I would suppose we should change that to the action in question. I think there is a better word than injury. And any pain, suffering, and mental anguish that your find from the evidence in the case which she is reasonably certain to suffer in the future from same cause.

(p. 7) I am at this time denying the defendant's that there should be no futures. There has been that testimony that she continues to have sleepless nights that she continues to feel some anxiety and anguish. I think it's a jury question, and accordingly, the only place that the mental anguish will be referred to as the Court can find will be in that damages instructions so entitled. It's already been there, and then we say [phonetic] Carry against Phifis. In this connection, you may take into account – strike that – that's the damages, pain and mental anguish. I am confusing myself with the damages compensatory and nominal. I believe that's the instruction. What I'm referring to mental anguish, I believe that that's the instruction to which I am referring.

You should determine what sum of money will fully compensate the plaintiff for pain, suffering, and mental anguish that was approximately caused by the defendant's violation of the plaintiff's rights.

I knew there was one instruction I want to change, and that's the one. That's the only evidence which has been before us. I am going to leave the one that I've just read to you as is except perhaps changing resulting from injury in question. Any further question at this time?

MS. WAGNER: No, your Honor.

MR. ARMSTRONG: No, sir.

(p. 8) THE COURT: Do you have a better word for injury in question, Ms. Wagner?

MS. WAGNER: I think action in question is appropriate.

THE COURT: Mr. Armstrong?

MR. ARMSTRONG: That's fine.

THE COURT: I regret to take all of this time, but you folks continue to perplex the Court with shifting winds that are wrought with tension time after time after time. We will be back at 11:30.